Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

RONALD KOLODZIECZAK, et al.,

Petitioners,

vs.

JACK WAYNE FRIEND, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are exactly the same questions presented in defendants' earlier Petition for Writ of Certiorari which was granted by this Court on *January 19, 1993* (*Friend v. Kolodzieczak,* 113 S.Ct. 1038 (1993)) (Appendix A2). The District Court and Ninth Circuit's subsequent order and opinions still do not comply with the holding in *Farrar v. Hobby,* 113 S.Ct. 566.

I. Where jail policy prohibiting personal possession of rosaries and scapulars is vindicated, and upheld on appeal (*Friend v. Kolodzieczak* (9th Cir. 1991) 923 F.2d 126) do the provisions of 42 United States Code §§ 1983 and 1988 authorize a finding that the losing plaintiffs are "prevailing parties" for an award of attorneys' fees?

A) May a District Court award over $150,000.00 in attorneys' fees to lawyers appointed by that court to represent county jail inmates on a religious practices claim that enjoyed no significant success?

B) May the District Court base its award of attorneys' fees on the "success" the inmates achieved via their religious minister's request for separate religious services prior to, and independent of, the lawsuit?

II. Where defendants argued in the District Court that use of religious items at services was not barred by jail policy, can defendants' compliance with the District Court's condition of granting the defendants' motion for summary judgment, (i.e. clarification or confirmation of that policy), result in an award of over $150,000.00 in attorneys' fees to plaintiffs' counsel?

QUESTIONS PRESENTED FOR REVIEW – Continued

A) Where a concession made by defendants in order to terminate the litigation below is a "nuisance settlement," is not constitutionally required, and is not curative of any constitutional deficiency, can the District Court base its award of attorneys' fees on this concession?

B) Where no constitutional provision, case or statute requires the county jail to allow "separate religious services" or "religious items" at religious services, can the county jail's decision to allow a separate time slot at one group's request and decision to specify that "religious items" are and have always been allowed at religious services in order to obtain a dismissal of meritless litigation, be found to be "success on a significant issue" meriting an award of attorneys' fees under 42 U.S.C. §1988?

III. May the District Court award substantial attorneys' fees without properly considering the relationship between the extent of success and the amount of fees awarded as required under *Farrar v. Hobby*, 113 S.Ct. 566 (1992).

IV. The final question presented by the practical effect of this lawsuit is: Where two religious groups are in a dispute, and one religious group threatens to withhold or withholds its services until its demands are met, may adherents of that group force the jail to accede to their demands via a § 1983 lawsuit claiming the jail has denied them religious services?

QUESTIONS PRESENTED FOR REVIEW – Continued

On further consideration ordered by this Court, the District Court and the Ninth Circuit have actually increased the attorneys' fees award previously summarily vacated by this Honorable Court.

PARTIES TO THE PETITION FOR WRIT OF CERTIORARI

The parties to the proceeding in the court whose judgment is sought to be reviewed are JACK W. FRIEND, MICHAEL WETHERN, and JEFFREY D. GRAY, individually and as representatives of the class of Catholic inmates in the North County Jail of Alameda County.

The defendants were RONALD KOLODZIECZAK, HAROLD ESTES, CHUCK GREEN, R. A. FRIST and A. THEOBALD. These were nominal parties to the litigation, as the jail commander, CAPTAIN MORRIS HICKERSON, was responsible for the implementation of jail policy at all times in question. Pursuant to the stipulation of the parties, CAPTAIN HICKERSON, who pursuant to the Government Code of the State of California §995, was entitled to indemnity and defense from his employer, the SHERIFF'S DEPARTMENT OF THE COUNTY OF ALAMEDA, was the actual defendant to this action. It is not believed the defendants other than CAPTAIN MORRIS HICKERSON, and his employer COUNTY OF ALAMEDA, and supervisor, SHERIFF CHARLES PLUMMER, have any interest in the outcome.

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COME NOW defendants and appellants, RONALD KOLODZIECZAK, CAPTAIN MORRIS HICKERSON, SHERIFF CHARLES PLUMMER, COUNTY OF ALAMEDA, et al., and respectfully petition the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 9th Circuit, filed September 19, 1995.

OFFICIAL OR UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

This lawsuit was initially filed in the Northern District of California, Marilyn Hall Patel, Judge. (D.C. No. CV 87-0161 MHP).

Judgment in favor of defendants was affirmed by the United States Court of Appeals (9th Cir. 1991) 923 F.2d 126 (Appendix B).

Plaintiff's Petition for Award of Attorneys' Fees was granted by District Court Order dated July 10, 1990 (Appendix K) and amended July 20, 1990 (Appendix L). The decision of the District Court awarding attorneys' fees was affirmed by the United States Court of Appeals for the Ninth Circuit in an opinion and judgment filed May 19, 1992, No. 90-16140, 965 F.2d 682, opinion by Judge Pregerson, joined by Judge O'Scannlain. Dissenting opinion by Judge Ferguson (Appendix A).

Following a defense petition for certiorari to the United States Supreme Court, the fee award was *summarily vacated* by this Honorable Court and the case was remanded to the Ninth Circuit (Appendix A2), then to the

Northern District Court for re-examination of the reasonableness of the attorneys' fees award in light of this Court's decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992). (*Friend v. Kolodzieczak*, 992 F.2d 243 (1993)). *Despite* contrary precedent of the United States Supreme Court and even the Ninth Circuit, the Ninth Circuit Court of Appeals (before Harry Pregerson, Warren J. Ferguson, dissenting opinion, and Diarmuid F. O'Scannlain, Circuit Judges), upheld the latest increased District Court award. (*Friend v. Kolodzieczak*, 65 F.3d 1514 (1995)).

Defendants filed a Suggestion for Rehearing In Banc with the Ninth Circuit October 2, 1995. (Appendix S.) To date, defendants have received no notice whether rehearing will be granted.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Following remand, the opinion of the United States Court of Appeals for the Ninth Circuit awarding attorneys' fees to plaintiffs' attorneys was filed September 19, 1995. (Appendix A1.) Pursuant to U.S. Supreme Court Rule 13.4, the time within which to file a petition for writ of certiorari expires December 18, 1995.

This Court has jurisdiction to review the judgment in question by writ of certiorari, and, indeed, has already done so once. Pursuant to U.S. Supreme Court Rule 10.1(a) and (c), the Court of Appeals has again sanctioned such a departure by the Northern District of California from the accepted and usual course of judicial proceedings and interpretation of 42 United States Code §1988 as

to call for the exercise of this Court's power of supervision.

The federal question decided on the issue of attorneys' fees in this case conflicts with the decisions of other United States Courts of Appeals, the Ninth Circuit's own prior decisions, and with decisions of this Court.

This case involves an important question of federal law on the award of attorney's fees in civil rights litigation which, while perhaps not maliciously prosecuted, failed to achieve success on any constitutional rights issue in the litigation.

The statutes involved in this case are 42 United States Code §1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

And 42 United States Code §1988 which provides in pertinent part:

> . . . . In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318,

> or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The bases for subject matter jurisdiction in the District Court were 28 United States Code §§1331 and 1343.

The statutory basis of the Court of Appeals jurisdiction was 28 United States Code §1291.

STATEMENT OF THE CASE

This action was originally filed by three inmates at the Alameda County North County Jail on January 14, 1987. By order dated September 7, 1987 the United States District Court for the Northern District of California, Marilyn Hall Patel, Judge, issued an order for service of the complaint on defendants (Appendix C) and appointing Amitai Schwartz, former staff counsel of the American Civil Liberties Union, as counsel to represent the three plaintiffs (Appendix D, P). From a reading of plaintiffs' complaint, the court concluded that the complaint alleged state action depriving plaintiffs of a right, privilege or immunity secured by the Constitution. In an order dated September 17, 1987 (Appendix C) the court found that the confiscation of rosary beads from plaintiffs' cells pursuant to a policy prohibiting the personal possession of items of personal property by inmates in cells, other than jail-issued items, stated a cognizable claim of a rights deprivation. The court further held that the

inmates' allegation that they were denied religious services including confession, communion and Bible Study and other religious articles also stated a cognizable claim.

By order dated June 30, 1988 the District Court granted plaintiffs' motion for class certification and granted leave to file a First Amended Complaint (Appendix E). The inmates alleged in their First Amended Complaint not only the prohibition of personal possession of rosaries or scapulars in their cells, but also that *jail officials* repeatedly *denied their requests to attend mass* conducted by Roman Catholic priests or to participate in the sacraments of the Catholic Church such as confession and communion. Plaintiffs alleged that no Roman Catholic services had been allowed in the jail since its opening in October of 1984.[1] These allegations were patently and demonstrably untrue. (Appendix M, N, O.)

In certifying the action as a Class Action, the District Court found "the common question of law is whether the policy of forbidding the possession of these religious articles and denying scheduled access to the celebration of mass and to the sacraments is constitutional." (Order of June 30, 1989, Appendix E, p.A63.)

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[1] The Catholic minister appointed by the Catholic Bishop of Oakland (Appendix M) was not a priest and could not say mass or hear confessions. When asked about allegations of no mass *allowed by the jail* he said that celebration of the mass was neither necessary nor practical given the logistics and circumstances of the jail and its population. The minister provided communion, and arranged for confessions (sometimes) but was dissatisfied with his Protestant co-ministers and the program in general because it was, in his assessment, 'not a quality program' (See Dissent, Judge Ferguson, Appendix B.)

Hearing on cross motions for summary judgment was held on October 24, 1988. The motions were taken under submission at that time. On March 13, 1989 a status conference was conducted by the District Court (Appendix Q; R). On April 6, 1989 it was requested by defendants that the court rule on the motions for summary judgment (Appendix F, p.A68). On September 29, 1989 the court granted summary judgment for defendants and denied plaintiffs' motion for summary judgment on condition that the Alameda County Jail submit a revision to its jail manual to verify the existence of its policies and procedures regarding accommodation of the religious needs of inmates (Appendix F). This condition was complied with on October 24, 1989 (Appendix G, H) and an order of dismissal was entered on November 7, 1989 (Appendix I). Plaintiffs, who claim to be the *prevailing parties* in this action filed *their* Notice of Appeal on December 4, 1989. The judgment of the District Court was affirmed by the Ninth Circuit U.S. Court of Appeals in *Friend v. Kolodzieczak*, 923 F.2d 126 (9th Cir. 1991) (Appendix B).

While this matter was on appeal, plaintiff's attorney filed a Notice of Motion for Attorneys' Fees and Costs on January 8, 1990. On June 20, 1990 the District Court issued a memorandum and order awarding attorneys' fees to Mr. Schwartz, the same attorney the District Court had appointed to represent the inmates in 1988 (Appendix J).

By order dated July 10, 1990, and amended July 18, 1990, the District Court ordered defendants to pay a total of $93,782.72 in attorneys' fees to the plaintiffs' attorneys (Appendix J, K, L).

Notice of appeal of this order was filed July 19, 1990.

The District Court issued a stay of its award of attorneys' fees pending appeal in 1990.

The order granting defendants' motion for stay was reissued October 3, 1990 on defendants' submission of evidence allowing waiver of a bond.

The stay remains in effect.

On May 19, 1992, the United States Court of Appeals for the Ninth Circuit, in a two to one decision, upheld the District Court's award of attorneys' fees to plaintiffs' attorneys. The Court of Appeal affirmed the District Court's finding that the jail officials had taken steps that gave inmates benefits without addressing whether a constitutional violation had occurred or whether the inmates were entitled under the constitution to the "benefit," nor the reasonableness of the fee award in relation to the "benefit" obtained. The opinion of the United States Court of Appeals for the Ninth Circuit was filed May 19, 1992 No. 90-1614, 965 F.2d 682 (1992) (Appendix A).

The inmates argued in their lawsuit that all forms of religious practice were prohibited by North County Jail regulations. The allegation was absurd and demonstrably untrue. The jail administration, offended by allegations of religious intolerance, when exactly the opposite attitude had always been evidenced by jail officials, presented in opposition evidence of a comprehensive religious program and numerous available avenues of religious practice in the North County Jail. (See Judge Ferguson's dissenting opinion, Appendix A.)

It was the contention of the defendants that the inmates and their appointed counsel were more interested in litigation and confrontation than in actually doing what they claimed the jail would not allow. This was evidenced by the fact that inmates could have used the religious articles at issue under existing jail regulations allowing the use of religious items in connection with religious services. The District Court suggested to the defendants that it would be inclined to grant their motion for summary judgment if these representations of what the jail policies really were were clarified to the District Court. In light of the astronomical cost of this litigation, the defendants had no choice but to comply with the condition imposed by the Northern District for granting of the motion for summary judgment and "termination" of this litigation.

It is uncontested that the program objected to by the "Catholic" inmates at the time the suit was ordered served was the very program agreed to in writing by their own Catholic Bishop (Appendix M)!

At the time the inmates initially filed suit, the jail's chaplain had retired. At the same time the three Catholic inmates and their appointed counsel were litigating this lawsuit, the lay Catholic jail minister was pressing the jail administration for change in the jail program. (A separate time slot for his group, Appendix O.) It was suggested to the District Court that the congruity of claims being made by the Catholic inmates and their appointed attorneys in the lawsuit with those of the Catholic Charities minister, James Rodgers, placed the defendant jail administration in the unenviable position of having to respond to a lawsuit seeking damages and attorneys' fees on one

hand, while attempting to respond to normal requests from the Religious Services administrator of Catholic services on the other, all the while in the midst of a dispute between Catholic and Protestant religious groups. This put defendants in the impossible position of either denying a request from religious ministers practicing in the jail in order to avoid the appearance that the inmate's Civil Rights suit had accomplished any goal, or granting the request only to be found liable for attorneys' fees and damages and unfavorable treatment of the *other* religious groups.

It was determined by the jail administration that since there had never been any violation of inmate constitutional rights to the free exercise of religion, the newly appointed jail chaplain was free to make whatever scheduling arrangements and coordination of same (subject to ultimate approval of the jail captain) he saw fit in the continuing relationship with inmates and ministers of various religious persuasions at the North County Jail. The "delay" the District Court accused the jail of engaging in, if anything, was due to the logistics of the jail, temporary lack of a chaplain, the fact that the Catholic group was not the only religious group in the jail, and that a change in the program would necessarily affect the other religious groups. Justifiable fear of entanglement also cautioned deliberation. That plaintiffs' attorneys inspired massive enlargement of this litigation was ignored by the District Court which accused defendants of unnecessarily increasing legal expenses by conducting a vigorous defense. (Appendix J, p.A95).

Following the defendants' petition to the United States Supreme Court, this Court granted certiorari,

vacated the fee award, and remanded the matter to the Ninth Circuit for further review in light of this Court's then recent decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992). (*Friend v. Kolodzieczak*, 113 S.Ct. 1038 (1993).) (Appendix A2). The Ninth Circuit simply remanded the matter to the Northern District Court which appears to have misinterpreted *Farrar* in order to justify reaffirmance of its prior award of attorneys' fees. (Appendix A1). It then further inflated the fee award in an apparent gesture to cheer plaintiffs "along their road to ultimate victory." (Appendix A1, p.A10).

On appeal once again to the Ninth Circuit, and without entertaining oral argument, the Ninth Circuit rubberstamped its approval of the Northern District's award without so much as a comment from the majority. (Appendix A1).

Finally, on October 2, 1995, defendants filed a Suggestion for Rehearing In Banc which, to date, has not been favored with a response from the Ninth Circuit. (Appendix S).

REASONS FOR REVIEW

In this case, the Ninth Circuit Court of Appeal, on appeal from the District Court and on remand from the United States Supreme Court, in a sharply divided opinion, has twice upheld a finding of "prevailing party" status that is tantamount to a finding that any inmate grievance complaint filed in Federal Court that does not amount to malicious prosecution should provide a basis for an award of *full* attorney's fees.

Moreover, because, as this court has repeatedly recognized in the past, jails are particularly ill-suited to administration by judicial decree, jails throughout this country are virtually sitting ducks for massive attorney fee awards where any complaint, no matter how trivial, arises because inmates are dissatisfied with any aspect of the religious programs administered in a jail setting.

Under *Farrar v. Hobby*, 113 S.Ct. 566 (1992), this Honorable United States Supreme Court held that a fee award should be based upon the amount of success achieved by the plaintiffs, not to provide windfalls to attorneys. *Id.* at Page 575. A "judicial pronouncement that the defendant has violated the constitution, unaccompanied by an enforceable judgment on the merits, does not render plaintiff a prevailing party." *Id.* at Page 573. Additionally, the Ninth Circuit has applied a 2-prong test which asks 1) whether the lawsuit resulted in the relief obtained and 2) whether there is a legal basis for plaintiff's claim. *Sablan v. Dep't. of Fin. of Com. of N. Mariana Islands*, 856 F.2d 1317, 1325. Under neither of these standards can plaintiffs be deemed a prevailing party.

Here, no monetary award was made. No judgment was entered against any defendant. No finding of a constitutional violation, technical or otherwise, was made. No evidence of an actual constitutional rights deprivation, technical or otherwise existed.

"Concessions" made by the jail administration during the course of litigation were pointed to by plaintiffs as the basis for a fee award. That these "concessions" stemmed from a policy and practice of accommodation

and jail regulations that existed *prior to* the institution of suit or order for service of this litigation is undeniable.

Attorney fee awards based on nominal recovery where actual rights violations have been found is one thing. The principle may or may not pass muster. However, a District Court's attorney fee award where not even technical violations have occurred results in a fundamental, far-reaching intrusion into the operations of a county jail which has been specifically prohibited by this court in *Bell v. Wolfish*, 441 U.S. 520 (1979).

In *Texas State Teachers Association v. Garland Independent School District*, 109 S.Ct. 1486 (1989), the United States Supreme Court granted certiorari specifically "because of the *conflicting views* in the Court of Appeals, and because of the *importance of the definition of the term 'prevailing party'* to the application of [42 U.S.C.] §1988. . . . "

Like *Garland*, this matter involves the very same question of such exceptional importance: Who is the "prevailing party?" Also, whereas *Garland* involved the *lack of uniformity* amongst Fifth District Courts of Appeal in applying one of two "prevailing party" tests, this case simply involves lack of uniformity in applying the standard set forth under *Farrar v. Hobby, supra*, and *Sablan v. Dep't. of Fin. of Com. of N. Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988).

Previously, the Ninth Circuit has held that prison officials are not required to provide full religious Pentecostal services (including speaking in tongues and laying hands on one another) to inmates. *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995). In upholding Judge Marilyn Hall

Patel's summary judgment *in favor of defendants*, the Ninth Circuit Court of Appeal held there was no substantial burden on Bryant's religious rights and therefore no violation of the Religious Freedom Restoration Act. (42 U.S.C. §§2000bb.) Similarly, in an opinion authored by Circuit Judge Diarmuid F. O'Scannlain, the Ninth Circuit held that an Orthodox Jewish prisoner incarcerated at the Ely State Prison was not entitled to the spiritual counselor of his choice nor was the prison under any obligation to provide single-fabric clothing since such preferential treatment could cause conflicts amongst the inmates. *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993). Given the aforementioned rulings by the Ninth Circuit, the ruling in this matter is confusing and inconsistent to say the least.

The ramifications of such a decision provide a clear road map for the undermining of this court's emphatic rulings in this area requiring deference and restraint where correctional facilities are accused of rights violations.

While nominal damages have sometimes supported fee awards, nominal concessions have not. Therefore, this case insidiously allows indirectly what this court has expressly prohibited: Undue intrusion by the District Court in the day-to-day operations of a constitutionally observant and compliant county jail.

Nor did the District Court's opinion below properly consider the relationship between the limited extent of the insignificant "success" and the amount of the fee awarded, which fee was three times that of the attorneys retained by the defendant public entity and employees.

This is true even after this Honorable Supreme Court summarily vacated the initial District Court and Ninth Circuit awards and remanded this for further consideration in light of *Farrar v. Hobby*. The award has almost *doubled* despite this Honorable Court's instruction and order.

I.

STANDARD FOR DETERMINING A CONSTITUTIONAL RIGHTS VIOLATION BY JAIL ADMINISTRATORS

The fundamental question that was never decided against defendants in this litigation was:

> . . . [D]oes the practice or condition violate the constitution? (*Bell v. Wolfish*, 441 U.S. 520, 524.)

In *Bell v. Wolfish, Id.* 541 (Fn. 23) the District Courts were admonished that in the absence of *substantial evidence* that policy or practice impermissibly infringed on constitutional rights, the court should defer to the jail administration. As the record of hearings and threatened orders in this case makes clear, no deference to the jail administration was ever shown whatsoever. (Appendix Q, R.)

The basis upon which an award of attorneys' fees was ultimately made was summarized by the District Court's decision as follows:

> It is clear to this court that plaintiffs' suit provided the impetus for defendants to more diligently . . . coordinate services . . . to bring NCJ practice in line with plaintiffs' constitutional rights (Appendix J. p. 7).

The court said "the policy now is to accommodate Catholic inmates' request for participation in Roman

Catholic service and sacraments." The uncontroverted evidence in this case is that the policy of defendants was always to reasonably accommodate where possible the requests of all inmates for participation in religious services.

The District Court's memo granting attorneys' fees states: Defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to *mend their ways*. (*Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983).) This assumed there were "ways" to be mended, and pre-judged that defendants' jail religion policy was wrong, or more specifically, was violative of constitutional rights, simply because that was *alleged* by plaintiffs.

The District Court's statement that the suit provided impetus for "more diligence in coordinating religious services" (Appendix J) was erroneous and ran directly contrary to this court's instruction that inmate rights suits are not to become vehicles for implementation of the District Court's idea of how best to operate a detention facility.[2] The effect of the *process* defendants were subjected to, as it turned out (Appendix Q and R, hearing transcripts) was that the plaintiffs' attorneys were left

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[2] *Bell v. Wolfish, supra*, Pages 539; 542-543 Fn. 25, and: Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. (*Id.* Page 535) and, *Kennedy v. L.A. Police Dept.*, 887 F.2d 920, 930 (9th Cir. 1989) 'when litigants petition the federal court to review the application of an institutional policy, the courts must proceed cautiously; the Supreme Court has sounded this warning emphatically and with considerable wisdom.'

with a superficially colorable claim to attorneys' fees, which was granted with gusto by the court which appointed them in the first place. The *process* used by the District Court in this case did not avoid unnecessary intrusion of the judiciary into problems particularly ill-suited to "resolution by decree" (*O'Lone v. Estate of Shabazz*, 107 S.Ct. 2400, 2405 (1987).)

This process revealed bleak alternatives for jail administrators sued in federal court where the court threatened to take over running of the jail: concession or contempt of court. The situation was made worse when the administration found itself in the middle of a "turf" dispute between Catholic and Protestant ministers.

In *Michenfelder v. Sumner*, 860 F.2d 328, 331 (1988) the Ninth Circuit noted:

> In applying the *Turner v. Safley* [482 U.S. 72] test we must accord great deference to prison officials' assessments of their interests . . . and separation of powers concerns counsel a policy of judicial restraint' [especially] [w]here a state penal system is involved,. . . . '

Uncontroverted facts showing as a matter of law a constitutionally adequate religious program at the North County Jail were presented to the District Court, but these facts had no effect in changing the court's conclusions drawn from its reading of the initial inmate pleading, nor its apparent determination to draw "concessions" from defendants under threat of placing the jail under court control, which are now being used to justify the lucrative fee award. Courts cannot improperly intrude on the running of a county jail nor impose or coerce a settlement. (*Thompson v. Cleland*, 782 F.2d 719

(7th Cir. 1986); *Kothe v. Smith,* 771 F.2d 667, 669 (2nd Cir. 1985).)

II.

THERE WAS NO CONSTITUTIONAL RIGHTS VIOLATION BY COUNTY JAIL ADMINISTRATORS

The rosary and scapular issue was decided by final judgment in favor of defendants. (*Friend v. Kolodzieczak* 923 F.2d 126 (9th Cir. 1991).) That judgment is final and no petition for certiorari was filed.

The constitution does not require *prisons* to provide each inmate with a paid chaplain of his choice. (*Allen v. Toombs,* 827 F.2d 563, 569 (9th Cir. 1987); *Cruz v. Beto,* 405 U.S. 319, 322 (Note 2) (1972); *Johnson v. Moore,* 926 F.2d 921 (9th Cir. 1991).) *Ward v. Walsh,* 1 F.3d 873 (9th Cir. 1993). Nor are prison officials obliged to provide full Pentecostal services. *Bryant v. Gomez,* 46 F.3d 948 (9th Cir. 1995) (This case involves not a *prison* but a *county jail.*

On religious services issues, courts have repeatedly found constitutional religious programs less comprehensive than those of the North County Jail. (*Horn v. People of California* (E.D. CA 1968) 321 F.2d 961, 965; aff'd 436 F.2d 1375 (9th Cir. 1970); cert. denied 401 U.S. 776 (certain prison chaplains paid but not others;) *Gittlemacker v. Prasse,* 428 F.2d 1 (3rd Cir. 1970) (jail need only supply the opportunity for worship and clergy visits, and was under no duty to supply the clergyman). (See also *Card v. Dugger,* M.D. Fla. 709 F.Supp. 1098; aff'd 871 F.2d 1023 (11th Cir. 1989), finding no violation where all prison chaplains Southern Baptist; Roman Catholic practitioners not permitted contact visits).

In the absence of fraud, collusion or arbitrariness, the decisions of church authorities regarding the qualification and selection of prison chaplains is conclusive. (*Gonzales v. Roman Catholic Archbishop* (1929) 280 U.S. 1; *McClure v. Salvation Army* (1972) 460 F.2d 553; and see *Duffey v. State Personnel Board,* 232 Cal.App.3d 1, 283 Cal.Rptr. 622 (1991).)

Here, the Catholic Bishop of Oakland appointed Catholic detention minister James Rodgers to participate in an ecumenical program at the jail (Appendix M). After about one year, Rodgers requested a different program, at a time when the jail's chaplain had retired and the position was not yet filled. There was disagreement between the Catholic jail minister and the inmates themselves as to what constituted necessary Catholic services. A separate time slot for Catholic inmates, while permissible (Cf. *Lemon v. Kurtzman* (1971) 403 U.S. 602 (entanglement of the state in religious affairs), was not constitutionally required.

> To say that a non-discriminatory religious practice exemption is *permitted* or even that it is desirable, is not to say that it is constitutionally required . . . (*Employment Division, Dept. of Human Resources v. Smith,* 110 S.Ct. 1591, 1606, 494 U.S. 872 (1990).)

When the District Court, after appointing counsel, reached what seemed like a foregone conclusion, i.e. that the suit caused the jail to be more diligent or accommodating in acceding to one group's request for a change in services, thus providing a basis for a $150,000.00 fee award, it became a classic example of the District Court substituting its ideas on how to best run the jail. The

Ninth Circuit decision affirming the award encourages that practice.

III.

PLAINTIFFS FAILED TO SUCCEED ON ANY SIGNIFICANT ISSUE INVOLVED IN THE CIVIL RIGHTS LITIGATION

Under *Farrar v. Hobby*, 113 S.Ct. 566 (1992), this Honorable United States Supreme Court held a fee award should be based upon the amount of success achieved by the plaintiffs, not to provide windfalls to attorneys. *Id.* at Page 575. A "judicial pronouncement that the defendant has violated the constitution, unaccompanied by an enforceable judgment on the merits, does not render plaintiff a prevailing party." *Id.* at Page 573. Additionally, the Ninth Circuit has applied a 2-prong test which asks 1) whether the lawsuit resulted in the relief obtained and 2) whether there is a legal basis for plaintiffs' claim. *Sablan, supra,* at 856 F.2d at Page 1325. Under neither of these standards can plaintiffs be deemed a prevailing party.

Under *Nadeau v. Helgemoe* (1st Cir. 1978) 581 F.2d 275 and *California Association of Physically Handicapped v. FCC* (9th Cir. 1983) 721 F.2d 667, the test that plaintiff must pass is "legal as well as factual" because "if it has been judicially determined that defendants' conduct, however beneficial it may be to the plaintiffs' interest, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau, supra* at 281. See also *Ortiz de Arroyo v. Barcelo,* 735 F.2d 275 (1st Cir. 1985).

As the amount of fees charged must be reasonably related to the results obtained, the $150,000.00 awarded in this case is excessive as a matter of law. (*Hensley v. Eckerhardt*, 461 U.S. 429 (1983).)

No finding whatsoever on this issue was made by the District Court where plaintiffs' attorneys' fees were three times those charged by the attorneys for defendant. It has been said that attorneys' fees may not be properly awarded where, as here, the public entity finds itself in the middle of two groups' demands, where, no matter which course it follows, might subject it to one group's complaint of unconstitutional conduct (see e.g. *Grano v. Barry*, 783 F.2d 1104, 1111-1112 (D.C. Cir. 1986).)

The grounds for pressing the "religious access" and "religious services" issues were as a matter of law a strawman issue, pretextual and confrontational in nature, "more contrived than real" (*Naprstek v. City of Norwich*, 433 F.Supp. 1369, cited in *Nadeau v. Helgemoe, supra*, Fn. 3 Page 279) and constituted no more than a trivial, incidental or insignificant "success" by plaintiffs, no different than any nuisance settlement (*Chicano Police Officers Association v. Stover*, 624 F.2d 127, 131 (CA 10 1980); cited in *Texas State Teachers v. Garland Independent School District*, 109 S.Ct. 1486, 1493, 488 U.S. 815 (1989).)

> [A] civil rights plaintiff may not collect attorney's fees for demanding that a state officer do what he would have done in any case. (*Coen v. Harrison County School Board*, 638 F.2d 24, 26 (5th Cir. 1981), Cert. Denied 455 U.S. 938, 102 S.Ct. 1427 (1982).)

Plaintiffs conceded use of religious items *during* religious services was not a "core issue."

That there is always room for improvement in practice or program is not evidence or finding of rights violations, especially in a setting acknowledged by this court as one beset with "intractable problems" (*O'Lone v. Estate of Shabazz*, 107 S.Ct. 2400, 2404-2405.) Because something is desirable does not make it constitutionally required. (*EDD v. Smith, supra*, 110 S.Ct. 1591, 1606.)

That inmates, church groups, chaplains, or jail personnel propose alternatives for more or different religious services in a jail setting, whether acted upon or not, does not equal "evidence of a wrong" or "vindication of a right." The jail program did not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional. (*Bell v. Wolfish, supra*, Fn. 25, Pages 542-543.) In a jail setting, the "right" in question must be viewed "sensibly and expansively." (*Thornburgh v. Abbott*, 104 L.Ed. 459, 476, 490 U.S. 401.)

While the vindication of rights by settlement or informally without a judgment can form the basis for a finding of prevailing party status (*Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978)), the vindication must be of *rights* and evidence of the existence of the *wrong* and of its vindication as a proximate result of the lawsuit must be produced. In a jail setting, proof of the existence of the wrong is a difficult task, one described as a *heavy burden* of showing that the inherent limitation of rights caused by the fact of incarceration itself constituted a *legal wrong*. (*Bell v. Wolfish, supra*, Page 546, 561-562.) This action appeared to begin with the assumption by the trial court that the jail was guilty.

"The touchtone of the prevailing party inquiry must be the *material alteration of the legal relationship of the parties* in a manner which Congress sought to promote in the fee statute." (*Texas State Teachers v. Garland Independent School District, supra* 107 S.Ct. 1486 (1989) 488 U.S. 815.)

Defendants' conduct in revising the jail manual to reflect a pre-existing reality in order to terminate this litigation was therefore gratuitous, not required by law, and plaintiffs did not prevail in a legal sense as a matter of law. (See *California Association of Physically Handicapped v. FCC, supra,* 721 F.2d 667, 671-672 (9th Cir. 1983).)

On this record any finding of substantial success was based on nothing but speculation and conjecture, and defies irrefutable facts showing that this massive litigation was totally unnecessary.

While it has never been contested that non-monetary success can justify an award of attorneys' fees in civil rights litigation, it is respectfully submitted that this case represents a "ground zero" at which success on the merits can not be detected. Under the principles enunciated by this court in *Hensley v. Eckerhardt,* 461 U.S. 424 (1982) the decision should be reversed.

CONCLUSION

Review by this court is again necessary to correct a situation which, if left as it is, will severely impair the ability of county jail administrators to run a jail. 42 U.S.C.

§1988 was never intended to reward attorneys for baseless claims or hollow victories. Left unresolved, the precedential significance of such a patently erroneous ruling is both staggering and frightening. For example, an attorney can now potentially sue a jail facility for §1983 relief alleging inadequate medical care, then claim victory after doing no more than obtaining copies of the medical school diplomas of the prison physicians. Or, an attorney could bring a lawsuit alleging malnutrition, then claim victory when all he obtains are copies of the prison's food service recipes. Finally, an attorney could file a lawsuit alleging overcrowded prison conditions, then claim victory when he receives a roster of inmates.

This case is an example of the District Court totally ignoring an emphatic pronouncement of this court, specifically that jails are not to be run on the basis of what a district court judge would do if he or she were the jail administrator, but that judicial intervention is to be limited only to circumstances where constitutional violations have been shown to exist by substantial evidence. The decision in this case cries out for resolution by this court. The dilemmas posed to jail administrators by this case deserve resolution by this court.

DATED: December 18, 1995

RICHARD L. REYNOLDS
BENNETT, SAMUELSEN, REYNOLDS & ALLARD
Attorneys for Petitioners

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APPENDIX A1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK W. FRIEND, et al., *Plaintiffs-Appellees,* v. RONALD KOLODZIECZAK, et al., *Defendants-Appellants.*	No. 93-16918 D.C. No. CV-87-0161-MHP ORDER, APPENDIX AND DISSENT

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Submitted* May 22, 1995
San Francisco, California

Filed September 19, 1995

Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges.

COUNSEL

Richard L. Reynolds, Bennett, Samuelsen, Reynolds & Allard, Oakland, California, for the defendants-appellants.

Amitai Schwartz, San Francisco, California, for the plaintiffs-appellees.

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*The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

ORDER

We affirm the district court's order on remand for the reasons stated in the district court's Memorandum and Order Re Attorneys' Fees and Costs (On Remand), filed September 14, 1993, attached as Appendix A.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al., *Plaintiffs,* v. RONALD KOLODZIECZAK, et al., *Defendants.*	No. C 87-0161 MHP MEMORANDUM AND ORDER RE ATTORNEYS' FEES AND COSTS (ON REMAND)

This case is back before this court on remand from the Supreme Court and the Ninth Circuit Court of Appeals for reexamination of the reasonableness of the attorneys' fees award in light of the Supreme Court's recent decision in *Farrar v. Hobby,* ___ U.S. ___, 113 S. Ct. 566 (1992). Plaintiffs also seek fees and costs for time spent defending the fee award and seek interest on the fee award.

Having considered the submissions of the parties, the court re-affirms its original award, orders that plaintiffs

be awarded fees and costs for time expended defending the fee award, and orders that all fee awards be paid with interest.

BACKGROUND

The facts of this case are treated in detail in this court's previous order of September 29, 1989. Briefly, plaintiffs, a class of all Roman Catholic inmates at Alameda County's North County Jail, brought this suit against county officials under the Civil Rights Act of 1964, 42 U.S.C. § 1983, seeking to secure access to Roman Catholic services and to possess certain sacramental articles (rosary beads and scapulars).

At hearings on cross-motions for summary judgment in October 1988 and March 1989, the parties indicated to the court that all issues regarding inmates' access to religious services had been resolved. Defendants further represented to the court that they were willing to allow inmates to possess rosaries and scapulars, but only under supervision. In September 1989, this court granted defendants' motion for summary judgment on the issue of whether jail officials were required to permit inmates access to rosaries and scapulars at all times, finding that unfettered and unsupervised possession of the sacramental articles was not constitutionally required. *Friend v. Kolodzieczak,* No. C-87-0161 (N.D. Cal. September 29, 1989). At the court's instruction, the defendants put in writing a policy regarding accommodation of inmates' religious needs.

Plaintiffs subsequently brought a motion for attorneys' fees and costs under the Civil Rights Attorney's

Fees Award Act of 1976, 42 U.S.C. § 1988. On June 20, 1990, the court granted plaintiffs' motion, awarding $72,445.00 in fees and $6462.22 in out-of pocket costs for the original litigation on the merits; the court further ruled that plaintiffs were entitled to fees and costs for time spent litigating the fee award. On July 10, 1990, the court fixed this latter amount at $14,875.50. On July 18, 1990, the court issued an amended order consolidating the previous two orders.

Defendants appealed this court's award of fees to the Ninth Circuit, which affirmed. *Friend v. Kolodzieczak,* 965 F.2d 682 (9th Cir. 1992). Defendants then appealed the Ninth Circuit ruling to the Supreme Court, which granted certiorari, vacated the judgment, and remanded the fee award to the Ninth Circuit for consideration in light of *Farrar. Friend v. Kolodzieczak,* 113 S.Ct. 1038 (1993). The Ninth Circuit subsequently remanded to this court with instructions to "re-examine its determination of the reasonableness of the attorneys' fees award" in light of *Farrar. Friend v. Kolodzieczak,* 992 F.2d 243 (9th Cir. 1993).

LEGAL STANDARD

Under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, a court may award reasonable attorneys' fees to a prevailing party in a civil rights action. In the absence of special circumstances, a prevailing party should recover reasonable attorneys' fees. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied and opinion amended,* 808 F.2d 1373 (9th Cir. 1987) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)).

As an initial matter, a court must first determine whether or not the party seeking fees has "prevailed." In order to qualify as a prevailing party, a plaintiff must obtain some relief on the merits of his claim that materially alters the legal relationship between the parties. *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989).

Having determined that a civil rights plaintiff is a prevailing party, the court may award reasonable attorneys' fees. In determining the amount of the award, a court generally should begin by calculating the so-called "lodestar" amount, arrived at by multiplying the number of hours reasonably spent in achieving the results obtained by a reasonable hourly rate. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). A court may also consider other factors, including the degree of success obtained, and make adjustments to the lodestar accordingly. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (enumerating the factors that may be considered in adjusting the lodestar amount), *cert. denied*, 425 U.S. 951 (1976).

DISCUSSION

I. *Reasonableness of the Fee Award in Light of Farrar*

The Supreme Court in *Farrar* did not dramatically alter the law relevant to attorneys' fees awards; instead the Court refined its analysis of the fee award issue while

in large part re-affirming its precedents. The *Farrar* decision does not undermine this court's original determination of what constitutes a reasonable fee award in this case.

In *Farrar,* the plaintiffs sued multiple defendants for $17 million but were ultimately awarded only one dollar in damages against a single defendant. *Farrar,* 113 S. Ct. at 570. On the plaintiffs' motion for attorneys' fees under section 1988, the district court awarded over $300,000 in fees, costs, and interest. The Fifth Circuit reversed the fee award, holding that plaintiffs could not be considered prevailing parties, given the minimal recovery. *Estate of Farrar v. Cain,* 941 F.2d 1311 (5th Cir. 1991).

The Supreme Court affirmed the denial of fees. Although the Court held that the plaintiffs were in fact prevailing parties, *see* note 2 *infra,* the Court found that the plaintiffs were nonetheless not entitled to attorneys' fees, since the only reasonable fee award for such a hollow victory was no award at all.

In reaching this conclusion, the Court reiterated that a court must determine a reasonable fee award in light of the degree of success obtained in the action. *Id.* at 574-75 (*citing Hensley v. Eckerhart,* 461 U.S. 424 (1983)). In certain circumstances, the minimal nature of the party's "success" will compel an award of no fee at all. *Id.* The Court held that in such a case a court may by-pass the initial step of calculating the lodestar fee. The district court's error in *Farrar* was its award of substantial fees "without 'consider[ing] the relationship between the extent of success and the amount of the fee award.' " *Id.* at 575 (citing *Hensley,* 424 U.S. at 438).

The plaintiffs in the instant case achieved far more than the type of "technical" or "de minimus" victory won by the plaintiffs in *Farrar,* and the fee award originally ordered is reasonable.[1] The plaintiffs here requested primarily injunctive relief and were for the most part successful in obtaining the relief that they requested. As this court stated in its original order, "[p]laintiffs achieved the right sought to expanded access to Roman Catholic services and sacraments, and gained explicit, written acknowledgment of the right to at least limited use of rosaries and scapulars." *Friend,* No. C-87-0161 (N.D. Cal. June 20, 1990), at 11. The changes accomplished were the

---

[1] The issue of whether or not plaintiffs are "prevailing parties" is not before this court on remand; the Ninth Circuit order instructed this court to re-examine only the reasonableness of the award. *Friend,* 992 F.2d at 243.

At any rate, *Farrar* clearly does not affect this court's original determination, affirmed by the Ninth Circuit, that plaintiffs prevailed in this case. In fact, the *Farrar* Court's refinements to the prevailing party analysis make it *easier* for parties to meet this threshold requirement, if anything. In reversing the Fifth Circuit's finding that the plaintiffs were not "prevailing parties," the *Farrar* Court reiterated that a party has prevailed "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar,* 113 S. Ct. at 573 (citing, *inter alia, Texas State Teachers,* 489 U.S. at 792-93). The Court held that even a plaintiff who is awarded only nominal relief is a "prevailing party" under this definition. *Farrar,* 113 S. Ct. at 573.

In the instant case, as pointed out in this court's original order and as detailed below, plaintiffs achieved substantially all of the results they originally sought in a way that clearly altered the legal relationship between the parties. *See Friend,* No.C-87-0161 (N.D. Cal. June 20, 1990), at 6 (citing, *inter alia, Texas State Teachers,* 489 U.S. at 792-93).

result of the instigation of this lawsuit. This court found that these policies reflected changes in jail policy brought about by plaintiffs' suit and were not, as defendants claimed, pre-existing jail policies. *Id.* at 7. The record establishes that without this action defendants would not have developed the policy ultimately adopted in this case. This result was more than merely "technical"; it "materially alter[ed] the legal relationship between the parties" in a manner that was meaningful and substantial. *Farrar,* 113 S. Ct. at 574.

In making its determination of reasonable fees, this court relied on the same precedent that is re-affirmed in *Farrar.* Specifically, this court noted that *Hensley* dictates that a court consider the overall results achieved by plaintiffs. *See Friend,* No. C-87-0161 (N.D. Cal. June 20, 1990), at 11. Although this court noted in its original ruling that it had granted defendants' motion for summary judgment on the issue of whether jail officials were required to permit inmates unlimited access to rosaries and scapulars at all times, it found then, and reaffirms now, that plaintiffs nonetheless prevailed on a significant portion of the relief sought. After assessing the degree of success achieved by the plaintiffs, this court found that plaintiffs were entitled to recover the fees they requested, equal to 85% of the lodestar amount. *Id.*[2]

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[2] The Ninth Circuit, in affirming this court's fee award, also noted the extent of plaintiffs' success. *See Friend,* 965 F.2d at 684-85. Although the Ninth Circuit's discussion of plaintiffs' success was in the context of analyzing whether plaintiffs qualified as "prevailing parties," as opposed to whether the award was reasonable, the two prongs of the fee award analysis are clearly related.

The fact that plaintiffs received no monetary relief is of no import, since, unlike the *Farrar* plaintiffs, the primary goal of the plaintiffs in this case was to obtain injunctive relief. *See Pembroke v. Wood County*, 981 F.2d 225, 231 n.27 (5th Cir.) (distinguishing *Farrar* on this ground), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2965 (1993). Nor is it relevant that plaintiffs obtained the relief they sought through settlement rather than a judgment in their favor. The Supreme Court in Farrar reaffirmed the principle relied on by this court in its original fee award that fees may be awarded due to relief obtained through a settlement or consent decree. *Farrar*, 113 S.Ct. at 503 (citing *Maher v. Gagne*, 448 U.S. 122 (1980)).

In short, there is nothing in *Farrar* that affects this court's original analysis of the reasonableness of the attorneys' fees in this case. Plaintiffs' victory in this case was no pyrrhic victory, as in *Farrar*, but rather was substantial and significant. Thus *Farrar* and the precedents on which it relies dictate that this court follow the "lodestar" method of calculating a reasonable fee award that it did in the first instance, with due consideration given to the degree of success obtained by the prevailing party.[3]

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[3] The court declines defendants' invitation to view this remand as an opportunity for a full-scale re-assessment of the court's initial fee award, including such matters (not raised by defendants at the time of the initial fee award) as whether plaintiffs' attorneys spent too much time on this litigation or exaggerated their hours. This court has already determined in its original orders that plaintiffs' attorneys have submitted sufficiently detailed records to substantiate the number of hours claimed. The court's mission on remand is to re-examine its ruling in light of *Farrar*, not in light of any new or previously litigated claim that defendants wish to raise.

II. *Plaintiffs' Entitlement to Fees For Hours Expended Defending The Award of Attorneys' Fees.*

Plaintiffs are entitled to compensation for all time reasonably spent defending this court's original orders awarding fees and costs, including time spent unsuccessfully opposing defendants' petition to the Supreme Court for a writ of certiorari. *See Cabrales v. County of Los Angeles,* 935 F.2d 1050, 1052-53 (9th Cir. 1991). The fact that plaintiffs lost one battle along their road to ultimate victory does not deprive them of their entitlement to fees and costs for that setback. *Id.*[4]

Plaintiffs have already been awarded fees and costs through the time of the court of appeals ruling on the fee issue. Plaintiffs now claim a lodestar amount of $17,005.00 for time spent litigating the fee award between the time of the court of appeal's ruling and July 9, 1993.[5]

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[4] Contrary to defendants' assertion, plaintiffs have not requested fees for their appeal of this court's summary judgment ruling regarding inmates' unsupervised possession of rosaries and scapulars, a claim on which plaintiffs ultimately were unsuccessful.

[5] Plaintiffs calculate this figure based on the following formula:

Amitai Schwartz	51.0 hrs.	x	$275/hr.	=	$14,025.00
Sue Ochs	2.5 hrs.	x	$175/hr.	=	$437.50
Dennis Farias	8.9 hrs.	x	$150/hr.	=	$1,335.00
Antonio Ponvert III	4.0 hrs.	x	$130/hr.	=	$520.00

See Schwartz Dec. at 3 (reflecting time spent through June 18, 1993). Mr. Schwartz spent an additional 2.5 hours (equalling $687.50 at the rate of $275 per hour) in reviewing defendants'

Plaintiffs also seek $779.58 in expenses for this time period. *See* Schwartz Dec. at 4; Supp. Schwartz Dec. at 2. Defendants contest this amount and contend that plaintiffs' documentation is inadequate. The court finds that given the total hours expended in this case, plaintiffs' documentation is sufficiently specific to justify an award of fees, and that the number of hours claimed is reasonable for the tasks described. Plaintiffs are therefore entitled to fees and costs in the amounts requested.

III. *Post-Judgment Interest*

Pursuant to 28 U.S.C. § 1961(a), plaintiffs are entitled to post-judgment interest on judgments "from the date of the entry of the judgment." The statute applies to awards of attorneys' fees and costs under section 1988. *Spain v. Montanos*, 690 F.2d 742, 747-48 (9th Cir. 1982).[6] Interest

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opposition to this motion and preparing a reply. *See* Supp. Schwartz Dec. at 1-2.

Plaintiffs' attorneys have increased slightly the hourly rate claimed from the rates accepted by this court in the original fees motion in 1990. *See Friend*, C-87-0161 (N.D. Cal. June 20, 1990), at n.3 (reflecting a rate of $235 per hour for Mr. Schwartz and $140 per hour for Ms. Ochs). Defendants have not disputed this increase in rates and the court finds the increase reasonable in view of inflation and rising cost of legal services over the past three years.

[6] Although *Spain* addresses only the issue of interest on fees, it follows that costs, as part of the same judgment, are also covered by the post-judgment interest statute. *See R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.) (awarding interest on both fees and costs), *cert. denied*, 464 U.S. 1009 (1983).

runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set. *Finkelstein v. Bergna*, 804 F. Supp. 1235, 1239-40 (N.D. Cal. 1992); *see also Perkins v. Standard Oil Co.*, 487 F.2d 672, 674-76 (9th Cir. 1973) (post-judgment interest runs from date attorneys' fees are first awarded even though the fee award is later reduced on appeal).

On June 20, 1990, this court entered an order for $72,445.00 in attorneys' fees, plus costs in the amount of $6,462.22, related to plaintiffs' litigation on the merits. In the same order, the court awarded plaintiffs their fees and costs related to the fee award litigation. Although the exact amount of this latter award was not fixed until July 10, 1990, interest on this award, as on the original award, runs from June 20, 1990, the date on which the entitlement to fees was secured. Plaintiffs state, and defendants do not dispute, that the rate of interest under 28 U.S.C. § 1961 on that date was 8.09 percent. Plaintiffs will therefore be awarded interest at this rate.

The court of appeals has previously awarded plaintiffs $17,244.17 for time spent defending this court's fee award through September 17, 1992 (the date on which the Ninth Circuit affirmed the fee award). Plaintiffs are entitled to interest on this amount from the date of that award on September 17, 1992. 28 U.S.C. § 1961; *Finkelstein*, 804 F. Supp. at 1239-40. Plaintiffs state, and defendants do not dispute, that the interest rate under 28 U.S.C. § 1961 on that date was 3.13 percent; accordingly, this court will order interest to be paid at this rate.

CONCLUSION

For the foregoing reasons, the court reaffirms its previous orders and HEREBY ORDERS:

1) that defendants pay the sum of $72,445.00 to plaintiffs as compensation for services rendered in connection with the original litigation;

2) that defendants pay the sum of $6,462.22 to plaintiffs as compensation for costs in the original litigation; and

3) that defendants pay the sum of $14,875.50 to plaintiffs as compensation for services rendered in connection with the fee litigation.

IT IS FURTHER ORDERED:

4) that the foregoing amounts be paid with interest at the rate of 8.09 percent from June 20, 1990;

5) that the amount awarded in fees by the Ninth Circuit ($17,244.17) be paid with interest, at the rate of 3.13 percent from September 17, 1992;

6) that the defendants pay the sum of $17,005.00 to plaintiffs in compensation for services rendered in connection with the defense of the fee award from September 17, 1992 through July 9, 1993; and

7) that defendants pay the sum of $779.58 to plaintiffs for costs incurred in defense of the fee award from September 17, 1992 through July 9, 1993.

IT IS SO ORDERED.

Dated: SEP 14 1993

FERGUSON, Circuit Judge, dissenting:

The majority, in affirming the district court's award of attorneys' fees in this case, has created an unexplained conflict with our case of *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995), by implicitly granting rights to Roman Catholics which are denied to other religious denominations. It must be understood that at no time during the course of this litigation has any authority of the Catholic Church maintained that the defendants deprived inmates of access to any tenet or belief mandated by the Catholic Church. Here, despite the fact that the legal relationship between the parties was not materially altered by the settlement of the case and despite the fact that the inmates did not win any right to Catholic denominated services or to unsupervised access to rosary beads or scapulars, the district court found that the plaintiffs were "prevailing parties" in their 42 U.S.C. § 1983 suit against the jail. As a result of the district court's holding and the majority's order, the taxpayers of Alameda County will now be forced to pay thousands of dollars in attorneys' fees for a civil rights case in which no civil rights were violated; therefore, I dissent.

I. Background

The case underlying the award of fees is a 42 U.S.C. § 1983 class action brought by a group of Alameda North County Jail's ("the jail's") Roman Catholic inmates. The inmates alleged that the jail violated their rights: (i) to

participate in Catholic religious services performed by a priest and (ii) to possess rosary beads and scapulars in their cells. At the original hearing on cross-motions for summary judgment, the parties agreed that all of the issues concerned with access to Catholic religious services had been resolved. The remaining issue, the inmates' right to possess rosary beads and scapulars in their cells, was resolved when this Court affirmed the district court's determination that the jail had legitimate security reasons for restricting inmates' private access to rosary beads and scapulars. *Friend v. Kolodzieczak,* 923 F.2d 126, 128 (9th Cir. 1991).

At the close of the original litigation, the inmates brought a motion for attorneys' fees and costs under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The district court awarded attorneys' fees and this Court affirmed the award. *Friend v. Kolodzieczak,* 965 F.2d 682, 686 (9th Cir. 1992) (Ferguson, J., dissenting), *vacated,* ___ U.S. ___, 113 S.Ct. 1038 (1993). Defendants appealed the award to the Supreme Court, which granted certiorari, vacated the judgment, and remanded for reconsideration in light of *Farrar v. Hobby,* ___ U.S. ___, 113 S.Ct. 566 (1992). This Court, in turn, remanded the case to the district court. *Friend v. Kolodzieczak,* 992 F.2d 243 (9th Cir. 1993).

On remand, the district court reaffirmed its original grant of fees and also awarded fees and costs for the time expended in defending the award on appeal. *Friend v. Kolodzieczak,* No. CV-87-0161-MHP, 1993 WL 372252, (N.D. Cal. Sept. 14, 1993). The majority has upheld the award and I must again dissent based on the fact that the plaintiffs were not "prevailing parties." The defendants

in this case settled neither in recognition of nor in response to the plaintiffs' rights, but rather, in furtherance of reasonable penological goals – peace and quiet among the inmate population.

II. Discussion

In affirming the district court for the reasons stated in the court's opinion, the majority find that the inmates qualify as a "prevailing party" and therefore are entitled to an award of attorneys' fees. A "prevailing party" is one who succeeds "on any significant issue in litigation" and achieves a resolution which "changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 791-92 (1989). When no formal relief is granted, a plaintiff may nevertheless be a "prevailing party" if the lawsuit provides the catalyst for constitutional reform by the government. *Sablan v. Dep't of Fin. of Com. of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988). The Supreme Court held in *Farrar* that "judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Farrar*, 113 S.Ct. at 573. In the case at hand, the jail's Roman Catholic inmates won neither an enforceable judgment against the defendants, a "judicial pronouncement that the defendants had violated the Constitution," nor a change in the legal relationship between themselves and the jail.

The record establishes that the jail provided interdenominational Christian services for the inmates on

Sunday mornings. A Catholic Charities lay minister, approved by the Bishop of Oakland, regularly participated in the interdenominational services with Protestant lay ministers and individually administered to the inmates during visiting hours. The lay minister brought holy communion to the inmates, taught with Roman Catholic texts and study guides, and arranged for the sacrament of confession with a priest upon an inmate's request. The inmates were also allowed to use rosary beads and scapulars during services or under other supervised conditions.

The record demonstrates that the Catholic lay minister was causing dissension in the jail by his attempts to convert prisoners of other religions to Catholicism. As a result of the heightened tensions between himself and the protestant group involved in the interdenominational worship services in the fall of 1987, the Catholic lay minister attempted to get approval for independent, Catholic-denominated services. Following the lay minister's failed effort to secure independent Catholic services, he terminated his ministry at the jail. As a result, the Catholic inmates at the jail experienced a period of time in which no Catholic minister, lay or otherwise, was available. The absence was not however, due to any negligence or restrictive intent on the part of the jail.

As soon as the disgruntled minister left his ministry, jail officials approached Catholic Charities for a replacement minister. It was during this period that the inmates brought suit against the jail seeking independent Catholic-denominated services and the right to use rosary beads and scapulars unsupervised in their cells. The jail settled the religious services case to prevent the jail from

becoming another Northern Ireland or Bosnia. There was no restraint of religious rights to the plaintiffs because they were never without access to interdenominational services which were approved by the Roman Catholic Bishop of Oakland. It must be repeated that at no time during this litigation has the proper authority of the Catholic Church ever stated that the policies of the jail prevented inmates from having a religious experience mandated by the Catholic faith. *See Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Under *Sablan*, we must follow a two part test to determine whether or not the inmates qualify as a "prevailing party." First, we must determine whether the lawsuit resulted in the relief obtained. *Sablan*, 856 F.2d at 1325. It is clear that the county did not settle the religious services portion of this case to grant the inmates their religious rights; the inmates were never deprived of their right to religious services. *See Bryant*, 46 F.3d at 949 (holding that under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, an inmate's 42 U.S.C. § 1983 challenge to a prison's restrictions on full religious services must meet the "substantial burden" test to be actionable). In addition, the district court held and this Court affirmed that the inmates suffered no loss of rights as a result of the jail's refusal to allow the private possession of religious articles. *Friend*, 923 F.2d at 128. Thus, the inmates suffered no violation of their rights, but for the legitimate purpose of prison security.

The second prong of the *Sablan* test looks to whether there is a legal basis for the plaintiff's claim. *Sablan*, 856

F.2d at 1325. It is undisputed that the interdenominational services were approved by the authorized leaders of the Catholic Church and they provided the religious rights to which the plaintiffs were entitled. *See Bryant*, 46 F.3d at 949-50. Neither the priests nor the prison deprived inmates of any right. Limited access to a Catholic priest is increasingly common throughout dioceses across the country as "[d]eclining numbers of U.S. Catholic priests have created a shortage in key religious services." Richard A. Schoenherr & Lawrence A. Young, *Full Pews and Empty Altars: Demographics of the Priest Shortage in the United States Catholic Dioceses* 307 (1993). Throughout the U.S. Catholic Church lay leadership is gaining greater and greater legitimacy both as a result of the Second Vatican Council's emphasis on lay participation in church ministry and as a result of the expanding parishoner-to-priest ratios. *Id.* at 354, 342. In light of such facts, it is absurd for courts to hold that Catholic prisoners have a greater right to access to a priest than parishioners do.

Following *Farrar*, this Court recently held that "to qualify as a prevailing party, a civil rights plaintiff 'must obtain an enforceable judgment against the defendant from whom fees are sought.' " *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir. 1994) (quoting *Farrar*, 113 S.Ct. at 573). The majority, in affirming the district court, reason that the inmates are a "prevailing party" because the jail, in response to a court order, provided the inmates with a written statement of the jail's policy regarding the possession of religious items. However, the existence of a written policy does not prove that the plaintiffs were victorious. No proof was offered to show that the prison *changed* its policy as a result of the plaintiffs' suit. In light

of the fact that this court has consistently held that: (i) prisoners do not have an unfettered right to individual, denomination-specific services, and that (ii) the jail has the right to restrict access to religious objects, I find it impossible to conclude that the plaintiffs were the "prevailing party" in this suit.

By concluding that the inmates were a "prevailing party," the district court and the majority have granted, in violation of the First Amendment, an alleged civil right to Catholics which in this Circuit does not extend to Protestants. *See Bryant*, 46 F.3d at 949. In *Bryant*, we held that prison officials were not required to provide full religious Pentecostal services to inmates because there was no evidence that the services which the inmates requested were mandated by the Pentecostal faith. The *Bryant* Court relies on *Graham* for the rule that:

> the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

Graham, 822 F.2d at 850-51. In this case the record is clear that the Catholic Bishop specifically approved inter-denominational services with Protestants to take the place of the traditional Mass because of the lack of Catholic priests. Without any explanation whatsoever, the majority imply that that is not good enough for Catholics,

but that it is good enough for other religious denominations. The failure of the district court and the majority to realize that by finding the plaintiffs to be "prevailing parties" it has granted rights to Catholics that it does not grant to other religious denominations is remarkable and dangerous.

The facts of this case remain uncontested. A group of inmates brought an action to enforce religious rights which they were never denied. As the Supreme Court reaffirmed in *Farrar,* fee awards under § 1988 should be based on the amount of success achieved by the plaintiffs and not provide windfalls to attorneys. *Farrar,* 113 S.Ct. at 575. The plaintiffs in this case could not and did not achieve any success as their rights were never violated. Any award of attorneys' fees is inappropriate.

APPENDIX A2

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 19, 1993

Mr. Richard L. Reynolds
Bennett, Samuelsen, et al.
1951 Webster Street, #200
Oakland, CA 94612-2909

Re: Ronald Kolodzieczak, et al.
v. Jack Wayne Friend, et al.
No. 92-292

Dear Mr. Reynolds:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Farrar v. Hobby, 506 U.S. ___ (1993).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK WAYNE FRIEND, et al., *Plaintiffs-Appellees,* v. RONALD KOLODZIECZAK, et al., *Defendants-Appellants.*	No. 90-16140 D.C. No. CV-87-00161-MHP OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and submitted
October 9, 1991 – San Francisco, California

Filed May 19, 1992

Before: Harry Pregerson, Warren J. Ferguson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Pregerson; Dissent by Judge Ferguson

SUMMARY

Attorneys and Judges/Attorneys' Fees

Affirming a district court judgment awarding attorneys' fees under Section 1988, the court of appeals held

that the award was proper because inmates in the underyling litigation were "prevailing parties" who had established the necessary causal link between the benefits initially sought and changes in jail policy.

Jack Friend, as representative of a class of Roman Catholic prisoners, brought an action under Section 1983 alleging violations of their constitutional right to free exercise of religion. The issue at trial involved the inmates' right to keep rosaries and scapulars with them at all times. The district court upheld the prison regulation as permissible, contingent upon submission by the officials of a revised prison manual setting forth prisoners' limited rights to possess religious articles. The district court also found that the inmates were "prevailing parties" entitled to attorneys' fees under Section 1988.

[1] A litigant need not succeed on every claim to qualify as the prevailing party. Rather, a party may recover its attorneys' fees if it succeeds on any significant issue in litigation that achieves somes of the benefits sought in bringing suit. In addition, the inmates may be considered prevailing parties even though they did not gain formal judicial relief. [2] In the absence of formal relief, the court focused on whether the inmates established a clear, causal relationship between the litigation brought and the practical outcome realized. [3] The court agreed that the necessary causal link was established between Friend's class action and changes in jail policy. The inmates had been successful on the issue of access to religion in a pre-trial settlement materially altering the legal relationship of the parties. [4] The inmates had also partially prevailed on their claim for inamte possession of religious articales. [5] Niether were the inmates' claims

frivolous; they raised legitimate issues related to their free exercise rights.

Judge Ferguson dissented, stating that the majority's holding that the inmates were the prevailing parties because the necessary causal connection existed between the class action and changes in jail policy, and the pre-litigation settlement which altered the legal relationship of the parties was factually and legally wrong.

COUNSEL

Maureen C. Brooks and Richard Reynolds, Bennett, Samuelsen, Reynolds & Allard, Oakland, California, for the defendants-appellants.

Sue Ochs, Law Offices of Amitai Schwartz, San Francisco, California, for the plaintiffs-appellees.

OPINION

PREGERSON, Circuit Judge:

This appeal presents the question whether the district court properly found appellees to be "prevailing parties" for an award of attorney's fees under 42 U.S.C. § 1988. We have jurisdiction to review the district court's decision under 28 U.S.C. § 1291. We affirm.

BACKGROUND

A group of Roman Catholic jail inmates filed a class action suit against officials of Alameda County under 42 U.S.C. § 1983 alleging violations of their constitutional

right to free exercise of religion. Jack Friend is the named class representative in this suit.

Some issues were settled before trial.[1] The only remaining free exercise claim at trial concerned the right of jail inmates to keep rosary beads and scapulars with them at all times.[2] The district court granted summary judgment in favor of the Alameda County officials. The court concluded that jail policy prohibiting religious articles in prisoners' cells was permissible under the Turner standard.[3] The court's order was, however, contingent upon submission by the officials of a revised prison manual setting forth prisoners' limited rights to possess religious articles.

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[1] In their initial complaint, the inmates sought improved access to religion by way of private confessions and separate Roman Catholic services. This issue was resolved before trial.

[2] Rosary beads are used to count prayers while praying. Scapulars are symbols of Mary, the mother of Jesus.

[3] In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Reasonableness is determined by a four-part test: (1) whether the regulation is rationally related to the legitimate government interest invoked to justify it; (2) whether the regulation leaves open an alternative way for prison inmates to exercise the right asserted; (3) the impact that accommodation of the asserted right will have on guards, other inmates, and prison resources; and (4) the absence of ready alternatives to the regulation. Id. at 89-90.

DISCUSSION

A district court may award attorney's fees to the prevailing party in an action brought under 42 U.S.C. § 1983. *Sablan v. Department of Fin.*, 856 F.2d 1317 (9th Cir.1988). We review the district court's finding of prevailing party status for clear error. *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124, 1125 (9th Cir.1983); *Sablan*, 856 F.2d at 1324. "We must reverse, however, if the district court used incorrect legal standards to reach this finding." *Lummi Indian Tribe*, 720 F.2d at 1125.

As an initial matter, we note that a litigant need not succeed on every claim to qualify as the prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Rather, a party may recover its attorney's fees if it "succeed[s] on any significant issue in litigation which achieves some of the benefit . . . sought in bringing suit." *Id.* (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)).[4]

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[4] Our recent decision in *Romberg v. Nichols*, Nos. 90-56125, 91-55012 (9th Cir. Feb. 20, 1992) is consistent with our holding in this case and with Ninth Circuit precedent. Like the Rombergs, the class of inmates is a prevailing party within the meaning of § 1988 because it succeeded on a significant issue. The form of that victory is not dispositive.

In *Romberg*, the jury found that the defendant police officers were liable for violating the Rombergs' Fourth Amendment rights. The jury awarded only nominal damages of one dollar. *Romberg*, slip op. at 1657. The district court then granted the Rombergs' motion for attorney's fees under § 1988, and the government appealed that decision. *Id.* at 1658.

We held that the Rombergs were prevailing parties within the meaning of § 1988, and rejected the argument that their victory was too insignificant to justify an award of attorney's fees. *Id.* at 1663. Specifically, we held that the amount of

Moreover, the inmates may be considered prevailing parties even though they did not gain formal judicial relief. *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam); *Sablan*, 856 F.2d at 1324; *Muckleshoot Tribe v. Puget Sound Power & Light*, 875 F.2d 695, 696 (9th Cir.1989). In the present case, the district court concluded that the inmates prevailed because they succeeded either completely or partially on their free exercise claims. As the district court found, Alameda County officials took actions before trial that gave the inmates benefits they sought in filing suit. The inmates also benefited from the conditional summary judgment motion.

In the absence of formal relief, we focus on whether the inmates have "established a 'clear, *causal relationship*

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damages awarded the Rombergs was not dispositive. *Id.* at 1664-65. Rather, the jury's finding that the police officers were liable for violating the Rombergs' Fourth Amendment rights was sufficient to establish prevailing party status under § 1988. *Romberg*, slip op. at 1662. ("the Rombergs prevailed on a significant issue, and they prevailed on the merits before a jury"); *see Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, (1989) ("[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties").

Our holding turned on the significance of the issue on which the Rombergs prevailed, and we rejected the argument that nominal damages reflected an insignificant victory. *Romberg* did not change established law that formal judicial relief is not necessary to support prevailing party status under § 1988. *See e.g., Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575 (1980) ("Nothing in . . . § 1988 conditions the District Court's power to award [attorney] fees . . . on a judicial determination that the plaintiff's rights have been violated. . . . [P]arties may be considered to have prevailed . . . without formally obtaining relief.").

between the litigation brought and the practical outcome realized.' " *Sablan*, 856 F.2d at 1324 (quoting *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir.1983)) (emphasis in original). We apply a two-part test to resolve this question. *Sablan*, 856 F.2d at 1325. First, we determine whether this lawsuit actually brought about benefits initially sought by the inmate class. *Id.* Second, we examine whether the inmates' claims had a legal basis. *Id.*

We agree with the district court that the necessary causal link was established between Friend's class action and changes in jail policy. The district court found that the inmates succeeded on the issue of access to religion in a pre-trial settlement.[5] In response to Friend's class action, jail officials agreed to hold separate Roman Catholic services and to diligently arrange and coordinate policies on prisoners' rights to practice religion.[6] The district

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[5] Although the dissenting opinion asserts otherwise, it is clear that distinctly Roman Catholic services were one of the benefits sought by the inmates in filing this suit. The inmates specifically complained of the lack of scheduled Roman Catholic religious services, as distinguished from the fundamentalist Protestant services that were available.

[6] The dissenting opinion suggests that this suit was simply a dispute between a Catholic lay minister and the Bishop, or between a Catholic lay minister and a Protestant minister, and that jail officials played no role in the absence of Catholic services. The jail conceded, however, that only a Protestant group operated in the jail after December, 1987, and that the jail captain asked the Catholics to "defer" their request to be allowed a time to conduct a Catholic service, until some indeterminate date in the future when a new chaplain would be hired. The record also indicates that Catholic Charities sent a letter to the jail captain requesting "a timeslot for a Catholic worship service" and that he responded, "I do not intend to alter the program

court concluded correctly that the pre-litigation settlement materially altered the legal relationship of the parties. This is "[t]he touchstone of the prevailing party inquiry." *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989).

The district court also found that plaintiffs partially prevailed on their claim for inmate possession of religious articles. Before commencement of this action, the jail policy manual was silent on the rights of inmates to use religious articles. County jail officials revised the manual in response to the district court's conditional summary judgment order. The revised manual explicitly recognized an inmate's right to limited use of religious articles. The district court found, and we agree, that a causal relationship existed between the inmates' suit and the changes in jail policy.

We turn now to the second part of the test to analyze whether the inmates' claims had a legal basis. *Sablan*, 856 F.2d at 1327. Alameda County officials contend that the inmates' claims had no legal basis because the actions taken by the County were not constitutionally mandated.

We reject this contention. In this context, our evaluation of the merits of a litigant's claims is extremely narrow. *Andrew v. Bowen*, 837 F.2d 875, 877 (9th Cir.1988). Our inquiry is "strictly limited to determining whether the claims asserted are 'frivolous, unreasonable, or

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until the Chaplain's position is filled." Thus it is undisputed that the only scheduled religious service in the jail was operated by a fundamentalist Protestant ministry, and that the Catholics' request to likewise have a scheduled service was indefinitely postponed by the jail.

groundless.' " *Id.* at 878 (quoting *Ortiz de Arroyo v. Barcelo*, 765 F.2d 275, 282 (1st Cir.1985)).

Our review reveals no basis for concluding that the inmates' claims were frivolous. We agree with the district court that the inmates raised legitimate issues related to their free exercise rights. Indeed, the district court conditioned its grant of summary judgment in favor of the county officials upon revision of the prison manual precisely because the inmates' free exercise claims were colorable. The district court's finding that the inmates' claims had a legal basis was not erroneous.[7]

CONCLUSION

We conclude that the class of Roman Catholic inmates prevailed against the Alameda North County Jail within the meaning of 42 U.S.C. § 1988. The judgment of the district court is AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

In this case the district court has ordered the taxpayers of Alameda County to pay thousands of dollars in

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[7] Alameda County officials argue that the attorney's fees awarded here are excessive as a matter of law. The officials do not argue that the district court calculated the fee amount improperly. Instead, they merely contend that the inmates did not achieve their goals. This argument simply restates their objection to the district court's finding that the class of inmates is a prevailing party within the meaning of 42 U.S.C. § 1988. Because we uphold the district court's decision, we need not pursue this claim further.

attorney's fees in a matter originating in a dispute between different religious groups. Because the defendants are not responsible for religious conflicts among private parties, I dissent.

I. BACKGROUND

This is an appeal from an award of attorney fees and costs to plaintiff pursuant to 42 U.S.C. § 1988. The district court awarded fees and costs finding that "plaintiffs' suit provided the impetus for defendants to more diligently attempt to arrange for personnel and to coordinate the services necessary to bring [Alameda] North County Jail practices in line with plaintiffs' constitutional rights."

The district court thus found that plaintiffs were prevailing parties, despite the fact that it never found that the County at any time had deprived the plaintiffs of any constitutional rights. Parties may be considered prevailing parties when a violation of rights is found, *see Romberg v. Nichols*, 953 F.2d 1152, 1157 (9th Cir.1992), or when they vindicate rights through settlement without formal relief. *Sablan v. Dep't of Finance of N. Mariana Islands*, 856 F.2d 1317, 1324 (9th Cir.1988) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam)). Here, no rights were violated so none could be vindicated.

The underlying case is a 42 U.S.C. § 1983 class action alleging the failure to provide inmates at the North County Jail in Alameda County the right to participate in religious services performed by a Roman Catholic priest and denying Roman Catholic inmates the right to possess rosary beads and scapulars in their cells.

Both parties filed motions for summary judgment. At the hearing on the cross-motions, the defendants agreed to set forth in writing the jail policies regarding religious services and access to religious articles. On September 20, 1989, the district court issued an order granting the County/defendants' motion for summary judgment and denying the plaintiffs' motion on the issue of possession of rosary beads and scapulars in their cells. The district court also directed defendants to submit to the court a written copy of the policy of the jail regarding the accommodation of the religious needs of inmates. Following submission of the written policy, the district court dismissed the action.

The plaintiffs appealed only the order of dismissal in regard to the rosary/scapular issue. A panel of this court consisting of Judges Goodwin, Browning and Rymer affirmed the district court in an unpublished opinion (*Friend v. Kolodzieczak*, No. 89-16703 (9th Cir. Oct. 24, 1990)). The panel held that the defendants had legitimate security reasons for banning rosaries and scapulars. The plaintiffs then filed their motion for attorneys fees and costs which was granted and this appeal followed.

The jail is a modern facility which houses over 700 inmates. The average length of stay is six days. The exception is about twenty-five inmates who have been at the jail for longer than two years. Religious services take place in two multi-purpose rooms on each of the jail's six housing floors.

Religious services are provided for all inmates at the jail through the jail chaplain as well as through religious volunteers. Although there is a Catholic church across the

street from the jail, the Catholic Diocese of Oakland has never assigned a Roman Catholic priest to minister at the jail due to a shortage of priests.

In January of 1987, the Catholic Bishop of Oakland assigned a lay minister, James Rodgers, from Catholic Charities, as the detention minister ("Rodgers"). At the jail, interdenominational Christian services were offered on Sunday mornings, in which Catholic Charities' volunteers participated. The Bishop had agreed to this arrangement as it was in keeping with the Catholic Dioceses' commitment to ecumenical cooperation. Rodgers used a Roman Catholic study guide and scriptural teachings as the basis for the services he conducted on Sunday morning. He also ministered to individuals as requested during visiting hours, and could bring the sacrament of communion to inmates at those times.

There were, however, tensions between the protestant group involved in the interdenominational program, Follow Up Ministries, and the Catholic Charities volunteers. The tensions escalated, and in the fall of 1987, lay minister Rodgers attempted to get his own Catholic-identified services. This was not due to any inability to minister to Catholics, however, but because he wanted to be able to proselytize to non-Catholics. Indeed, he admitted in his deposition that he did not even know who the Catholics in the jail were.

In December 1987 or January 1988, Rodgers stopped taking part in the interdenominational services altogether. Rodgers began to minister on an on-call basis only. He conditioned his return upon getting his own time slot for services, but the jail was not made aware of

this demand or that he had quit. Neither the Catholic Church nor Catholic Charities ever appointed anyone else to take his place.

II. APPLICABLE LAW

The majority holds that plaintiffs were the prevailing parties because the necessary causal relationship exists between the class action and changes in jail policy, and the pre-litigation settlement altered the legal relationship of the parties. Both conclusions are factually and legally wrong.

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), the Supreme Court held that plaintiffs who succeed "on any significant issue in litigation which achieve[s] some of the benefit the parties sought in bringing the suit, [have] crossed the threshold to a fee award of some kind." *Id.* at 791-92 (internal quotations omitted). However, at a minimum, there must be a "resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. A change in a legal relationship may be demonstrated through a judicial finding of a constitutional violation in cases where there is formal relief, *see, e.g., Romberg*, 953 F.2d at 1157, or in the case of informal relief, when it is determined that the lawsuit was the catalyst for constitutional reform on the part of the government. *Sablan*, 856 F.2d at 1325.

The Ninth Circuit has used a two part test to determine prevailing party status when there has been no formal relief. Proper application of this test assures that fees are not awarded if the government takes action but

there are no constitutional deficiencies. We first "determine what [plaintiffs] sought to accomplish in bringing [this] lawsuit and then determine whether the lawsuit was causally linked to the relief actually obtained." *Sablan*, 856 F.2d at 1325. Here, plaintiffs did not prevail in any of the claims presented in their complaint. Thus, the lawsuit did not bring about any benefits sought by the inmate class, and plaintiffs fail the first prong of the *Sablan* test.

The second prong of the *Sablan* test is whether there is a legal basis for plaintiffs' claims. *Sablan*, 856 F.2d at 1325. "If it is judicially determined that defendants' conduct, however beneficial it may be to plaintiff's interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Id.* at 1327 (citation omitted). The undisputed facts demonstrate without question that the County has never refused the plaintiffs the right and opportunity to practice their Roman Catholic religion and participate in Roman Catholic sacraments at the jail. In There was therefore no legal basis for the plaintiffs' claims, nor any change in the legal relationship between the parties. Thus, plaintiffs fail the second prong of the *Sablan* test.

III. DISCUSSION

The plaintiffs' complaint alleged that defendants denied them the opportunity to possess rosaries and scapulars, to participate in the sacraments of reconciliation (confession) and communion, and to attend Roman Catholic mass. The plaintiffs further complained of the

lack of visits from Catholic priests. All of these claims were groundless, and the plaintiffs did not prevail on any of them, nor did they obtain any other relief.

A. *Possession of Religious Articles.*

This court previously held that the defendants' refusal to permit personal possession of rosary beads and scapulars in cells did not violate plaintiffs' constitutional rights. The merits of that claim need not be relitigated here.

The jail's written policy of permitting the use of all religious articles at religious services after inspection predates the lawsuit. In the year that the lay minister attended the Christian ecumenical services, he never had a problem with bringing into the jail all religious items required to conduct services.

Nevertheless, defendants clarified its written its policy on religious articles.[1] The policy was changed so that it specifically mentioned rosaries and scapulars as examples of articles permitted during religious services. The majority asserts, without explaining, that the revision

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[1] The earlier policy stated, in relevant part: "All materials brought to the jail for detainee's religious edification will be delivered to . . . and distributed by the I.S.O. [Inmate Services Officer]. . . . No other items may be brought into the service and none may be taken from the service without prior approval and physical inspection by I.S.O."

The revised policy states in relevant part: "[r]eligious items, allowed only during the religious services, are limited to those which present only a moderate security threat. Examples include a rosary or a scapular."

was a material change in the legal relationship between the parties. However, the litigation concerned the possession of rosary beads and scapulars in cells, and the inmates lost. Nothing else was claimed or contested. The County continued to permit religious articles at religious services, as it had always done, and there is simply no evidence to the contrary.

To claim that clarifying a policy that always existed represents a material change in the legal relationship of the parties places form before substance. The plain fact is that the new writing did not change in any degree the legal relationship of the parties.

B. *Availability of Communion, Confession and Mass.*

The jail was not responsible for the availability of the sacraments of communion, confession (reconciliation) or mass which can be celebrated only by a priest. The lay minister could bring communion (wafers consecrated by a priest) to the inmates upon request during visiting hours. While Rodgers knew that he and his volunteers could bring communion during the inter-denominational services as well, they declined to do so.

Only priests may hear confessions. If an inmate requested the services of a priest, that request was conveyed to Catholic Charities by the jail chaplain or by other jail administrative personnel.

After lengthy discovery, the record shows only one instance in which an inmate's request for Catholic sacraments went unfulfilled. It involved Jack Friend's (the named plaintiff) request for confession. Catholic Charities

arranged for a priest to hear his confession. A private room, which is used for attorney-inmate conferences, but without a door, was available but the priest was not comfortable hearing confession in that room, and left. The jail, at Friend's request, made numerous attempts to contact the priest for another confession in an appropriate setting, but the priest never responded. The lay minister Rodgers admitted that "We've fallen down on that particular task [arranging confession for Friend] and it slipped through the cracks, and I'm not particularly proud of that."

Jack Friend was in jail awaiting trial for murder with special circumstances, and was considered a security risk. It is clearly unreasonable to assert that the County as the result of that single instance deprived an inmate of his constitutional religious rights. The room was one in which attorneys talked to their clients in confidence, and was satisfactory for Sixth Amendment purposes. The County cannot be faulted for not having the foresight to know that the room was not satisfactory for one Catholic priest. It certainly cannot be held responsible for the neglect of Catholic Charities in not scheduling the priest for another time.

As to the sacrament of mass, Rodgers acknowledged that the celebration of a Roman Catholic mass was neither necessary nor practical given the circumstances and logistics of a jail and the shortage of Catholic priests. The lack of priests is, of course, something outside the power of the County to correct.

In summary, the County did not violate the plaintiffs' rights vis-a-vis the Roman Catholic sacraments of confession, communion or mass, nor was any relief obtained which vindicated their religious rights in this regard. The County only set forth certain jail policies in writing which had always existed. There is absolutely no basis for prevailing party status on these issues. That leaves the issue of providing for separate Roman Catholic services by Catholic lay ministers.

C. *Separate Catholic-Identified Services.*

In their complaint, the inmates alleged a lack of Catholic religious services, in contrast to the services conducted by the group Follow Up Ministries, described as a fundamentalist Protestant group. The majority, pointing to this allegation, claims that through the suit the inmates won the right to conduct Catholic services.

The Catholic Charities lay minister, with the approval of the Bishop, joined in with the Follow Up Ministries volunteers to perform interdemonational services for much of 1987. During these services, he identified himself as a Catholic and used Catholic readings and scriptures as the basis for the service. Thus, contrary to the assertions of the majority, the Follow Up Ministry program permitted truly interdenominational services.

In the fall of 1987, the Catholic lay minister became dissatisfied with the interdenominational service which was approved and accepted by the Catholic Bishop and wanted to conduct a program separate from those services. His motive was to permit him to proselytize to non-

religious or non-Catholic inmates and had absolutely nothing to do with the religious rights of Catholic inmates. After December 1987, the Catholic lay minister refused to take part in Sunday services. This refusal explains why there were only services run by Follow Up Ministries after that date. It was not, as the majority implies, the fault of the jail; it was due to the preferences of the Catholic lay minister.

When the jail commander received Catholic Charities' written request for separate Catholic services in January 1988, he responded that he would not make any changes in the jail's religious program until the then vacant chaplain position was filled. That certainly should be understandable. The Bishop had informed the jail commander that the Catholic Charities lay minister would be participating an interdenominational service, citing the Church's commitment to ecumenical cooperation. But the lay minister became dissatisfied with this approach, and told the jail commander he wanted separate Catholic-identified services. When faced with a difference in opinion between the lay minister and his Bishop, the jail commander proceeded carefully and with caution, waiting for the new chaplain to arrive before making any change. It makes sense that the jail commander would not want to make this change without advice from the jail chaplain who was directly responsible for the religious program at the jail. To contend that the jail interfered with the religious rights of the jail inmates by waiting simply cannot stand.

The request for a space for separate Catholic services was not "indefinitely postponed," as the majority claims. Rather, it was implemented four or five months after the

new chaplain started. The failure to move more rapidly, however, does not implicate any of plaintiffs' constitutional rights. The impetus for the separate service was the Catholic lay minister's own idea of what should be provided, contrary to the program of his own Bishop. The previous lack of separate, Catholic identified services was not a constitutional violation. Thus, the *Sablan* test cannot be satisfied, because the lawsuit was not the "catalyst for constitutional reform." *Sablan, supra,* 856 F.2d at 1325. The institution of separate Catholic-identified services at the jail therefore does not entitle the plaintiffs to prevailing party status.

The Christian ecumenical service did not deprive the Catholic inmates of any religious constitutional right. That being the case, it cannot be asserted that slowness in instituting Catholic services was a constitutional violation. Section 1988 simply does not authorize the award of attorney fees because the jail did not make a change which was not constitutionally required as fast as the district court thought it should.

Before dismissing the case, the district court required a revised jail policy addressing accommodation to plaintiffs' religious needs, including the scheduling of religious services. However this writing also fails to transform plaintiffs into prevailing parties. The evidence is definite that the written policy was the same policy that the jail always carried out. There was no evidence that the jail had a practice or condition that violated the constitution. There was never a policy that interdenominational services were sufficient for all religious groups. The County had consistently provided separate facilities to the Black Muslims. The regular time and

location for Catholic-identified services agreed to by the jail chaplain and administration was at the request of Catholic Charities. The Catholic-identified service does not address the deficiency, alleged in the complaint, of Catholic priests to perform sacraments and minister to inmates.

The lay minister, who was authorized to minister to the Catholics, stopped taking part in Sunday services for his own reasons. The jail had nothing to do with the pique of the lay minister and the resulting absence of Catholic representatives at the Sunday services from January through October of 1988.

In order to bring back a Catholic presence on Sunday mornings (it remains unclear whether the inmates had a position or preference in the dispute between the Catholic lay minister and his protestant contemporaries), the new jail chaplain and the jail administration established a place for separate Catholic-identified services in October 1988. The district court considered this a vindication of plaintiffs' free exercise rights. As explained, this leap in logic is not supported by the facts or law. Catholic Charities, which performs the services, remains a lay ministry group that cannot address the lack of Catholic priests which was the basis of the litigation.

The district court also put much stock in the chronology of events, regarding the lawsuit as the "impetus" to bring the jail "in line with plaintiffs' constitutional rights." However, the County never violated the plaintiffs' constitutional rights; the actions taken by the County never expanded those rights in any way nor gave the plaintiffs anymore of what they asked for in the

complaint. The Catholic lay minister was the impetus for the Catholic-identified services, which can scarcely implicate a constitutional right if even the Bishop did not require them! The plaintiffs simply got no relief, and there was no "constitutional reform," *Sablan, supra,* 856 F.2d at 1325, so the lawsuit could not have been the impetus for anything.

IV. CONCLUSION

This litigation arose because of plaintiffs' dissatisfaction with the inability to possess certain religious items and problems with access to confession, communion and mass. As explained, the former was justified because of security concerns and the latter was not the fault of the jail. The litigation continued with the original demand transformed to one for separate Catholic-identified services. This demand came from the Catholic lay minister who was dedicated to proselytizing non-Catholics and who disagreed with his Bishop's approval of inter-denominational services. It was further fueled by the fact that the Catholic lay minister had a dispute with his protestant associates over that proselytizing and left the jail. A Catholic lay minister doesn't agree with his Bishop and gets into a dispute with his protestant associates, and the tax payers of Alameda County become subject to $100,000 attorney fees! It really is difficult to understand why that is not "frivolous, unreasonable or groundless."

The uncontested facts show that there was never any deprivation of religious constitutional rights by the defendants. The sole cause of there being any less opportunity to participate in religious services than they might

have enjoyed otherwise was the fact of incarceration and the lack of resources of the Catholic Church and Catholic Charities.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK W. FRIEND; MICHAEL WETHERN; JEFFREY D. GRAY, *Plaintiffs-Appellants.* v. RONALD KOLODZIECZAK, HAROLD ESTES; CHUCK GREEN; R.A. FRIST; A. THEOBALD, *Defendants-Appellees.*	No. 89-16703 D.C. No. CV-87-0161-MHP ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted October 3, 1990
San Francisco, California

Memorandum Filed October 24, 1990
Order and Opinion Filed January 3, 1991

Before: Alfred T. Goodwin, Chief Judge,
James R. Browning and Pamela Ann Rymer,
Circuit Judges.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Redesignating its previous memorandum disposition as an opinion, and affirming the district court grant of summary judgment, the court of appeals held that a

prison regulation prohibiting the possession of rosaries and scapulars in inmates' cells was constitutional.

Appellant Jack W. Friend brought a class action to challenge a prison regulation that prohibited inmates from possessing rosaries and scapulars in their cells. However, the prison inmates were allowed to attend Roman Catholic services and wear the scapulars and use the rosaries during the religious services and meetings with religious visitors. The district court found that prison officials had legitimate security and administrative reasons for banning these items from the inmates' cells, and that the appellants retained the ability to practice Roman Catholicism.

[1] Although inmates retain their first amendment right to free exercise of religion, this right is limited by virtue of their incarceration. A regulation that impinges on inmates' constitutional rights is valid if reasonably related to legitimate penological interests (the *Turner* test). [2] Prison officials introduced evidence that the purpose of the underlying policy in question was to limit the means by which inmates may obtain drugs, fabricate weapons, and otherwise disrupt jail security. They also introduced evidence that to allow inmates to possess rosaries and scapulars could threaten prison security by creating an impression of favoritism toward Roman Catholic prisoners, thereby generating resentment, envy and intimidation. [3] The court noted that the inmates in this case had alternative means of practicing Roman Catholicism in addition to having periodic access to rosaries and scapulars. [4] *Turner* instructs that where, as here, accommodation of an asserted right will have a significant ripple effect on fellow inmates or on prison staff, courts

should be particularly deferential to the informed discretion of corrections officials. [5] The inmates' proposed alternative of inspecting rosary beads and scapulars to determine whether they conform to pre-set standards of construction and composition was inadequate because it did not satisfy the prison officials' concern with the impression of favoritism.

COUNSEL

Sue Ochs, San Francisco, California, for the plaintiffs-appellants.

Richard L. Reynolds, Oakland, California, for the defendants-appellees.

ORDER

The request for publication is GRANTED. The memorandum disposition filed in this case on October 24, 1990 is hereby designated as an opinion.

OPINION

GOODWIN, Chief Judge:

In this class action, inmates of Alameda North County Jail appeal the summary judgment in their section 1983 action challenging as unconstitutional a prison regulation prohibiting them from possessing rosaries and scapulars in their cells. We affirm.

On behalf of all Roman Catholic prisoners of the North County Jail, plaintiffs alleged in their complaint

that the defendants denied them (1) the right to possess rosaries and scapulars in their cells, and (2) the opportunity to attend Roman Catholic services and to participate in religious sacraments performed by a Roman Catholic priest. They sought declaratory and injunctive relief and damages.

The defendants' answer generally denied that they had refused plaintiffs access to Roman Catholic services and sacraments, but admitted that the plaintiffs were not permitted to possess rosaries and scapulars in their cells.

The plaintiffs were prohibited from keeping rosaries and scapulars in their cells pursuant to a jail policy limiting items that inmates may have in their cells to items supplied by the jail or miscellaneous small items approved by a deputy at the jail. All other items are considered contraband.

Prior to the district court's ruling on cross motions for summary judgment, the parties agreed that the only remaining issue was whether the defendants could bar the plaintiffs from possessing rosaries and scapulars in their cells. The defendants' alleged failure to grant the plaintiffs access to Roman Catholic services and sacraments was no longer in issue, because the defendants scheduled a regular time and location for Roman Catholic services, promulgated rules allowing inmates an opportunity to participate in the Roman Catholic sacraments of confession and communion, and established a policy allowing inmates to use rosaries and wear scapulars during religious services and meetings with religious visitors.

The district court found that the defendants had legitimate security and administrative reasons for banning rosaries and scapulars, and that the plaintiffs retained the ability to practice Roman Catholicism.

Inmates retain their First Amendment right to free exercise of religion; however, this right is limited by virtue of their incarceration. *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987). Prison regulations are examined under a reasonableness standard that is "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). In determining whether the regulation is "reasonably related to legitimate penological interests," four factors should be considered ("the *Turner* test"):

(1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it;

(2) whether alternative means of exercising the right on which the regulation impinges remain open to prison inmates;

(3) the impact that accommodation of the asserted right will have on guards, other inmates, and prison resources; and

(4) the absence of ready alternatives that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests.

Friedman v. Arizona, Nos. 89-15671, 89-15696, 89-16720, slip op. 12121, 12130 (9th Cir. Sept. 27, 1990), *citing Harper v. Wallingford*, 877 F.2d 728, 732 (9th

Cir.1989) (emphasis in original); *see also Turner,* 482 U.S. at 89-90. All four factors weigh in favor of the regulation.

(1) *Logical Connection to a Legitimate Penological Interest*

The plaintiffs introduced evidence that the purpose of the underlying policy prohibiting inmates from possessing items of personal property not supplied by the jail is to limit the means by which inmates may obtain drugs, fabricate weapons and otherwise disrupt jail security. The defendants also introduced evidence that allowing plaintiffs to possess rosaries and scapulars could threaten jail security by creating an impression of favoritism toward Roman Catholic prisoners, thereby generating resentment, envy and intimidation. These are legitimate penological interests. *See Standing Deer v. Carlson,* 831 F.2d 1525, 1529 (9th Cir.1987) (upholding a prison regulation banning the wearing of headgear in the prison dining room against a free exercise challenge by Native Americans in part on the ground that "special arrangements for one group could create an appearance of favoritism that could generate resentment and unrest.")

(2) *Alternative to Exercise Right*

Here, the plaintiffs have alternative means of practicing Roman Catholicism in addition to having periodic access to rosaries and scapulars. The parties do not dispute that Roman Catholic inmates may: (1) attend Roman Catholic services weekly; (2) use rosary beads and scapulars during these religious services; (3) receive sacraments of the Roman Catholic church such as confession and communion; (4) receive visits from religious workers; (5) say the rosary with the aid of rosary pamphlets, which they are permitted to have in their cells.

(3) *Impact of Accommodation*

The defendants introduced evidence that allowing plaintiffs to possess rosary beads and scapulars would create an impression of favoritism to Catholics and would lead to inmate requests for a variety of personal items on religious grounds. *Turner* instructs that where, as here, "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

(4) *Ready Alternatives*

The plaintiffs' proposed alternative – requiring prison officials to set up a system for inspecting rosary beads and scapulars to determine whether they conform to pre-set standards of construction and composition – is inadequate because it does not satisfy prison officials' concerns that allowing rosary beads and scapulars would create an impression of favoritism toward Roman Catholics and would lead to endless inmate requests for nonapproved personal items on religious grounds. *Cf. Standing Deer*, 831 F.2d at 1529 (rejecting Native American inmates' proposal that prison officials inspect religious headgear as alternative to ban on headgear on the ground that it did not answer prison officials' concern that allowing the headgear could create an appearance of favoritism and generate unrest).

Accordingly, we conclude that the prison regulation satisfies the *Turner* test and affirm the summary judgment.[1]

AFFIRMED.

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[1] We need not decide whether *Employment Div., Dept. of Human Resources v. Smith*, ___ U.S. ___, 110 S.Ct. 1595 (1990), lessens the government's burden under *Turner*, because appellants fail the *Turner* test.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

v.

RONALD KOLODZIECZAK, et al.,

Defendants.

NO. C-87-0161 MHP

ORDER

Plaintiffs allege violation of their constitutional rights in connection with Alameda North County Jail authorities' denial of religious services and removal of religious articles under 42 U.S.C. §1983. Plaintiffs seek leave to proceed in forma pauperis against defendants; Ronald Kolodzieczak, Harold Estes, Chuck Green, R.A. Frist, and A. Theobald. This court, in its discretion, grants plaintiffs leave to proceed in forma pauperis. 28 U.S.C. §1915.

For the reasons set forth below, plaintiffs have stated a cognizable claim against the defendants. Therefore, this court orders that all named defendants be served.

DISCUSSION

To state a cognizable claim under section 1983, plaintiffs must allege: (1) defendants acted under color of law and (2) defendants' action deprived plaintiffs of a right, privilege, or immunity secured by the Constitution. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). In accordance with section 1983, plaintiffs have properly sued state actors and alleged fourteenth and first amendment violations.

I. Plaintiffs Have Failed To State A Violation Of Their Fourteenth Amendment Procedural Due Process Rights.

Due Process only requires that a post-deprivation remedy be available to a prisoner who is negligently deprived of his or her property. *See Parratt v. Taylor,* 451 U.S. 527, 543 (1981). In *Parratt,* the prisoner was negligently deprived of his hobby kit. Despite the prisoner's deprivation of property the Supreme Court held that the prisoner had not established a violation of his fourteenth amendment rights. *Id.* at 537. Plaintiffs claim that while incarcerated at the Alameda North County Jail, Jeff Gray's rosary beads were confiscated. Plaintiffs allege that all the named defendants denied plaintiffs' requests to return the rosary beads. Since plaintiffs allege that the rosary beads were intentionally taken in an effort to deprive plaintiffs their opportunity to practice their religion, *Hudson v. Palmer,* 468 U.S. 517, 533 (1984) instead of *Parratt* is controlling. Under *Hudson,* a prisoner does not have a cognizable claim when the seizure is "random and unauthorized" and a post deprivation remedy is available. In *Hudson,* the Court explains that a prisoner has a cognizable claim only when the seizure is the result of an "established state procedure". *Id.* at 534. Here, plaintiffs have failed to allege that the seizure was intentional and the result of an "established state procedure", and therefore, have failed to state a violation of their due process rights.

II. Plaintiffs Have Stated A Violation Of Their First Amendment Rights And Therefore Have Stated A Cognizable Claim Under Section 1983.

Prisoners clearly retain protections afforded by the first amendment, *Pell v. Procunier*, 417 U.S. 817, 822 (1974), albeit limited. The Supreme Court recently discussed prisoners' religious rights in *O'Lone v. Estate of Shabazz*, 482 U.S. 343, 107 S. Ct. 2400 (1987). The Court reiterated that the first amendment's prohibition on the free exercise of religion extends to prisoners. *Id.* at 2404. However, the Court went on to state that prisoners' first amendment rights, like all constitutional rights possessed by prisoners, may be limited if the limitation serves "valid penological objectives – including deterrence of crime, rehabilitation of prisoners, and institutional security". *Id.* Accepting the plaintiffs' allegations as true, it does not appear that any of the penological objectives mentioned above are served by confiscating plaintiff Gray's rosary beads.

Plaintiffs also allege that prison authorities have denied them access to religious services including confession, communion, and Bible study, and religious articles. Again accepting plaintiffs' allegations as true, it does not appear that any penological objectives are served by these actions, especially in light of plaintiffs' allegations that inmates of Protestant faiths are permitted religious services. These allegations are sufficient to state a claim.

On facts similar to these, another district court denied a motion to dismiss because the plaintiff alleged that religious items, such as Bibles, prayer books, prayer shawl, tefillin, and yarmulke, had been seized and that

the seizure had curtailed his religious practices in violation of his first amendment rights. *Balabin v. Scully*, 606 F.Supp. 176 (S.D.N.Y. 1985). The court explained that the plaintiff's allegation, if proved, would warrant recovery at trial, and therefore, defendants' motion to dismiss should be denied. The plaintiffs in this case, like the plaintiff in *Balabin*, have alleged facts sufficient to state a first amendment violation claim, and therefore, have stated a cognizable claim under section 1983.

As all defendants are named as participating in the continued confiscation of the rosary beads and the denial of religious services and other religious articles, plaintiffs have stated a cognizable 1983 claim against all named defendants. Accordingly, this court orders that (1) all defendants be served and (2) counsel be appointed to represent plaintiffs.

IT IS SO ORDERED.

DATED: Sept. 17, 1987

MARYLIN HALL PATEL
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

v.

RONALD KOLODZIECZAK, et al.,

Defendants.

NO. C-87-0161 MHP

ORDER APPOINTING COUNSEL

Plaintiffs in this prisoner section 1983 (42 U.S.C. § 1983) claim requests and qualifies for appointment of counsel. Attorney Amitai Schwartz has consented to accept appointment Accordingly,

IT IS ORDERED as follows:

1) Amitai Schwartz, Esq., is appointed counsel in this action in accordance with the subject to General Order No. 25 of this court;

2) Counsel may obtain authorization for reimbursement of out-of-pocket expenses as needed by application to this court in letter form stating the nature of the expenses to be incurred;

3) A status conference shall be held in Courtroom No. 5, 17th floor, 450 Golden Gate Avenue, San Francisco, on April 25,1988 at 9:30 a.m. and a joint statement on the enclosed pretrial preparation form shall be filed by the parties on or before April 18, 1988.

DATED: FEB. 23, 1988

MARILYN HALL PATEL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

vs.-

RONALD KOLODZIECZAK, et al.,

Defendants.

NO. C-87-0161 MHP

MEMORANDUM AND ORDER

Plaintiffs Jack Wayne Friend, Jeffery Dee Gray and Michael Wethern filed this action in proper seeking declaratory and injunctive relief as well as compensatory damages under 421 U.S.C. §1983, alleging violation of their first amendment rights to the free exercise of religion. By order filed September 17, 1987, this court granted plaintiffs leave to proceed in forma pauperis, found that the complaint stated cognizable claims, ordered that the defendants be served and ordered that counsel be appointed for plaintiffs. By order filed February 23, 1988 the court appointed counsel pursuant to General Order No. 25 of this court. The case is now before the court on plaintiffs' motion to file a first amended complaint and motion to certify the action as a class action. Having considered the memoranda of the parties and their arguments at hearing, for the following reasons, the court grants the motion to certify the class and grants leave to file an amended complaint.

BACKGROUND

Jack Wayne Friend is a pre-trial detainee in the Alameda North County Jail ("the Jail"); Jeffery Dee Gray

is incarcerated – in the Jail as a prisoner of the County of Alameda; and Michael Wethern was incarcerated in the Jail as a prisoner of the County of Alameda but is now incarcerated at San Quentin. All three plaintiffs practice Catholicism and all three were deprived of their rosaries and scapulars according to an official policy of the Jail that forbids prisoners to have such items in their possession. A rosary is a string of beads used for counting a series of prayers. A scapular is a religious garment worn over the shoulders made of two pieces of cloth joined by a cloth string.

Plaintiffs also allege that Jail officials repeatedly denied their requests to attend a mass conducted by a Roman Catholic priest or to participate in the sacraments of the Catholic church, such as confession and communion. No Roman Catholic services have been held in the Jail since October 1984. Plaintiffs allege that the only religious services regularly made available to inmates by Jail officials are those conducted or overseen by Follow Up Ministries, a Protestant fundamentalist group which neither adheres to nor permits the teachings of Roman Catholicism.

On September 17, 1987, this court ordered that the defendants be served and respond and that counsel for plaintiffs be appointed. The defendants answered on October 23, 1987. The answer admitted that inmates of the Jail are not permitted to possess rosary beads or to wear scapulars. Defendants denied that Roman Catholic services are not available to inmates of the Jail.

Counsel was appointed for plaintiffs by order of February 23, 1988. Plaintiffs' counsel filed these motions on April 18, 1988.

DISCUSSION

1. Motion to Certify the Action as a Class Action

Plaintiff Jack Wayne Friend moves the court to certify this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) or, alternatively, under Rule 23(b)(1)(A). The class he seeks to represent consists of "all Roman Catholic inmates who are now or will be incarcerated in the Alameda North County Jail." Proposed first amended complaint [hereinafter "complaint"] at para. 13. Defendants oppose class certification on the grounds that the requirements of Rule 23(a) have not been met.

A motion for class certification must first meet the requirements of Rule 23(a). *National Ass'n of Radiation Survivors [NARS] v. Walters*, 111 F.R.D. 595, 598 (N.D. Cal. 1986). Subsection (a) provides four prerequisites for a class action. See Fed. R. Civ. P. 23(a). The court must determine that the class is so numerous as to make joinder of all parties impracticable; that there are common questions of law or fact; that the claims or defenses of the class representative are typical of the class; and that the class representative will fairly and adequately protect the interests of the class. *See id.*

To satisfy the numerosity requirement of Rule 23(a), the exact number of class members need not be known, so long as the evidence indicates that the number is large enough to make joinder of all parties impracticable.

NARS, 111 F.R.D. at 598-99. Plaintiffs have demonstrated that the numerosity requirement is met. First, relying on an estimate by the jail's former chaplain, plaintiffs estimate that Roman Catholic inmates at the Jail number about 80 at any time. Declaration of Sue Ochs at para. 4. This number is sufficiently large to meet the numerosity requirement. *See Perez-Funez v. District Director, Ins.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) (there is no fixed number establishing a lower threshold for class certification). Second, when evaluating the practicability of joinder, it is appropriate to consider not only the nature of the action and the relief sought, but also the inability of the members of the class to institute individual suits, which weighs against the possibility of joinder and in favor of class certification. *NARS*, 111 F.R.D. at 599. Where, as here, the proposed class includes unnamed and unknown future members and by its nature its population is a changing one, joinder is patently impracticable and the numerosity requirement is met regardless of class size. *See id.* Further, the action is a constitutional challenge that seeks declaratory and injunctive relief. Such actions have been recognized by this court to be particularly appropriate for class action treatment. *Id.* at 599-600.

Defendants argue that it is feasible and preferable to join as plaintiffs "all inmates who may voice similar concerns as to their individual ability to worship being affected by policies and regulations which address overall jail security/safety." Defendants' Opposition at 6. Reconstituting the issues as defendants would like, however, does not change the nature of the action or make joinder more practicable. Neither does this argument

address the concerns of the numerosity requirement as set out in the case law. Indeed, defendants fail to cite a single case supporting their theory of numerosity. Accordingly, the court finds that the numerosity requirement has been met.

By admitting that no inmates are permitted to possess rosaries or to wear scapulars, defendants as much as concede that there are questions of law and of fact common to all members of the class. The common question of law is whether the policy of forbidding the possession of these religious articles and denying scheduled access to the celebration of mass and to the sacraments is constitutional. Defendants' principal objection seems to be that the Jail is according all inmates equal protection – that is, that no inmates are permitted to have such articles. This argument, however, goes to the merits of the case rather than the certification of the class. The issue here is not whether the Jail's policy is unconstitutional, but whether this issue is common to all members of the proposed class. The court concludes that it is. All inmates of the Jail, present and future, who are adherents of the Roman Catholic faith and wish to observe their religion while incarcerated are affected by the policy, which may prove to violate the free exercise clause of the Constitution.

The claims of plaintiff Friend, who will represent the class, are also typical of those of the class. Defendants contend to the contrary on the grounds that religious worship is a highly personal and individual pursuit which is incapable of proper class representation. The implication seems to be that Friend's style of worship is anomalous and that relief would force all Roman Catholic inmates to practice according to his style. The claims in

this case, however, are not peculiar to him. Friend claims the right to have the opportunity to say prayers using a rosary and wearing a scapular and to take part in mass and holy sacraments. These are commonly practiced methods of worship in the Catholic faith. Moreover, if this argument were permitted to prevail, it would eviscerate the class action as a mechanism for redressing violations of constitutional rights. *International Molders & Allied Workers v. Nelson,* 102 F.R.D. 457, 462 (*N.D.* Cal. 1983). The argument that Friend cannot know if other inmates have suffered from the Jail's policies begs the question. Plaintiffs have alleged that those inmates who wish to practice Roman Catholicism have been prevented in every meaningful way from doing so. Further, the argument that inmates have different security statuses goes to the question of the scope of appropriate relief, not to the availability of relief. In sum, defendants have advanced no argument which weighs against a finding that Friend's claims are typical of all those inmates who might wish to practice Roman Catholicism.

Plaintiffs will fairly and adequately represent the class. This court appointed plaintiffs' attorney and knows him to be experienced and skilled in this type of litigation. Defendants have failed to point out any conflicts or the potential for conflicts between plaintiff Friend and the class he seeks to represent. Accordingly, the requirements of Rule 23(a) have been met.

The requirements of Rule 23(b)(1) and (b)(2) are also met. Because the focus of the action is on the issue of constitutionality and because injunctive and declaratory relief are sought, certification pursuant to subsection (b)(2) is more appropriate. Accordingly, a class of all

Roman Catholic inmates who are now or who will be incarcerated in the Alameda North County Jail is certified to proceed pursuant to Rule 23(b)(2) on the claims for declaratory and injunctive relief. If this certification proves to be too broad, the court may later redefine or narrow the class. The claim for compensatory damages will be tried individually because it is not brought by Friend on behalf of the class.

II. Motion to File Amended Complaint

Defendants do not seriously oppose the motion for leave to file the first amended complaint. Their opposition is limited to the merits of the case and the advisability of class action certification. No prejudice to the defendants is alleged. Moreover, this is the first complaint submitted in this case by an attorney. The first amended complaint alleges additional facts, adds new claims for relief and adds as defendants the County of Alameda and those officials who are responsible for promulgating the challenged policy.

In view of the early stage of the proceedings and the fact that defendants have failed to bring to the court's attention any prejudice that might result, the court exercises its discretion to permit the filing of the proposed first amended complaint. *See* Fed. R. Civ. P. 15(c); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). Defendants have thirty (30) days from the date of hearing, that is until June 15, 1988, to file and serve an answer to the amended complaint.

CONCLUSION

For the foregoing reasons, the motion to certify a class and motion for leave to file the first amended complaint are granted:

IT IS SO ORDERED

Dated: JUNE 30, 1988

MARILYN HALL PATEL
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,
Plaintiffs

-vs.-

RONALD KOLODZIECZAK, et al.,
Defendants

NO. C 87-0161 MHP

MEMORANDUM AND ORDER

Plaintiffs, a class of all Roman Catholic inmates at the Alameda North County Jail, brought this action under 42 U.S.C. § 1983, seeking damages and injunctive relief for alleged violations of their First Amendment right to the free exercise of religion. At hearings on October 24, 1988 and March 13, 1989, the parties agreed that the sole remaining issue in the case is whether plaintiffs have a constitutional right to possess religious articles in their cells at all times. Having considered the arguments of the parties, the court grants defendants' motion for summary judgment on this issue and denies plaintiffs' motion. Upon defendants' submission of a final written statement detailing the jail policy on religious exercise, the court will dismiss the action.

BACKGROUND

At the time this suit was filed, Jack Wayne Friend was a pre-trial detainee in the Alameda North County Jail ("the Jail"); Michael Wethern was incarcerated in the Jail as prisoner of the County of Alameda but is now incarcerated at San Quentin; and Jeffery Dee Gray remains incarcerated in the Jail as a prisoner of the County of

Alameda. All three plaintiffs practice Catholicism and all three were deprived of their rosaries and scapulars according to an official policy of the Jail that forbids prisoners to have such items in their possession. A rosary is a string of beads used for counting a series of prayers. A scapular is a religious garment worn over the shoulders made of two pieces of cloth joined by a cloth string.

In the complaint, plaintiffs also alleged that Jail officials repeatedly denied their request to attend a mass conducted by a Roman Catholic priest or to participate in the sacraments of the Catholic church, such as confession and communion. Plaintiffs alleged that the only religious services regularly made available to inmates by Jail officials were those conducted or overseen by Follow Up Ministries, a Protestant fundamentalist group which neither adheres to nor permits the teachings of Roman Catholicism.

At hearings on October 24, 1988 and March 13, 1989, the parties indicated to the court that all issues regarding religious access for inmates at the jail had been resolved, except the question of the possession of rosary beads and scapulars at all times by inmates in their cells. Defendants represented to the court that they were willing to allow inmates to use the religious articles under the supervision of visiting priests or lay workers, but that security and administrative concerns would not allow for the permanent possession of rosary beads and scapulars by inmates. On April 3, 1989, Richard L. Reynolds, counsel for defendants, wrote the court that an impasse on the rosary bead and scapular issue had been reached, and requested that the court adjudicate the pending cross-motions for summary judgment.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the non moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), *on remand*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1028 (1988). *See also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (If the moving party meets its initial burden of demonstrating the absence of any genuine issue of material fact, the non moving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non moving party.").

DISCUSSION

Prison inmates are protected by the First Amendment's directive that no law shall prohibit the free exercise of religion. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citing *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam)). However, not all prison regulations which infringe on constitutional rights are invalid. *O'Lone*, 482 U.S. at 348. Instead, "prison regulations alleged to

infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349. Under this standard, "the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

In *Turner*, the Court enunciated a four-part test for evaluating regulations burdening prisoners' First Amendment rights. First, a regulation must have a logical connection to legitimate governmental interests invoked to justify it. 482 U.S. at 89. Second, the reviewing court must examine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. The third consideration is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.*

In *O'Lone*, the Court applied *Turner's* test to a situation similar in some respects to that of the case at bar. *O'Lone* involved the claims of Muslim prisoners who were prevented by a prison regulation from participating in Jumu'ah, a weekly religious service commanded by the Koran. The Court held that, despite "the central importance of Jumu'ah," 482 U.S. at 351, the regulation was not unconstitutional. In so holding, the Court stressed the deference granted the professional judgment of prison administrators in matters of security. *Id.* at 349. The Court specifically rejected the Third Circuit's approach, which had required that prison administrators prove "that no

reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems." *Id.* at 347 (quoting *Shabazz v. O'Lone*, 782 F.2d 416, 420 (3d Cir. 1986)).

The court has found only one case applying the *Turner* analysis to a situation involving inmates desiring to possess religious articles.[1] In *Higgins v. Burroughs*, 1988 U.S. Dist. LEXIS 2885 (E.D. Pa. 1988), a regulation banning the carrying of rosary beads by inmates in the prison visiting room was upheld by a Pennsylvania district court. The administration defendants in that case presented affidavits detailing their belief that rosary beads could be reinforced with wire or other materials, rendering them potentially dangerous weapons. 1988 U.S. Dist. LEXIS at 12. No evidence that such a use of rosary beads and ever occurred was presented. Defendants also presented affidavits supporting their view that the beads could be used to conceal contraband, *id.* at 9-10, and that inspecting the beads would be administratively burdensome. *Id.* at 13-14.

The court upheld the regulation, finding defendants' statements of the dangers of rosary beads "unrefuted." *Id.* at 25. The court also noted that the plaintiff retained alternative means of exercising his religious beliefs,

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[1] In 1969, the Eastern District of Pennsylvania held that the prohibition on the possession or wearing of religious medallions by Black Muslim inmates did not violate the First Amendment. *Knuckles v. Prasse*, 302 F. Supp. 1036, 1059 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971). That case, however, which arose well before *Turner*, *O'Lone* and their Supreme Court predecessors, is of virtually no precedential value in this district in 1989.

including participating in Mass, using the beads at other times, possessing a Catholic missal and consulting with chaplains. *Id.* at 16-17.

The court now turns to the application of the *Turner* factors to the case at bar.[2]

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[2] In another opinion, also from the Eastern District of Pennsylvania, the court dismissed (with leave to amend) a complaint alleging violation of an inmate's First Amendment religious rights in a prison's confiscation of unspecified religious articles because the complaint failed to spell out the particular prohibited articles. *Young v. Shuler,* 1988 U.S. Dist. LEXIS 299 (E.D. Pa. 1988). The court observed that "[c]onfiscation by prison officials of certain religious articles might be reasonably related to the paramount penological objective of maintaining security. . . . Rosary beads, for example, can arguably be used to conceal contraband or to injure another inmate and, therefore, be subject to confiscation." 1988 U.S. Dist. LEXIS at 2.

The court notes that there is only one reported post-*O'Lone* case in the Ninth Circuit involving inmate possession of religious articles. In *Sample v. Borg,* Judge Karlton of the Eastern District of California struck down a ban on the possession of ceremonial tobacco ties by Native American inmates, rejecting defendants' arguments that allowing possession of the ties would cause security and administrative problems. The court stated that

> application of the four-fold test [the *Turner* test] demonstrates the impropriety of a total ban [on possession of the ties]. The question of the burden on prison personnel which may be attendant upon requiring that the sacks be opened for inspection may be made de minimis by limiting the number of ties which may be possessed. In like manner, limiting the tensile strength of the string which may be used minimizes the danger of the tie being used as a weapon.

675 F.Supp. 574, 581 (E.D. Cal. 1987), *vacated as moot,* 870 F.2d 563 (9th Cir. 1989).

1. Connection Between the Governmental Interest and the Rule

Defendants' have stated two reasons for banning the full-time possession of rosary beads and scapulars by inmates at the jail. First, they state a concern that the articles could be used as weapons. Second, they allege that increasing the number of items prisoners are allowed to have in their possession would unduly burden the prison administrators, since maintaining a very restricted list of permitted items fosters institutional control. Defendants also make a "floodgates" argument, claiming that if Catholic inmates are allowed rosaries and scapulars, other inmates of other faiths will require other religious articles and substantial administrative resources will be required to handle such other requests and monitor the expanded list of permissible possessions.

Defendants have introduced no evidence that rosary beads or scapulars have ever been used as weapons. Instead, they rely on the statements of jail administrators speaking generally from their experience and specifically from their knowledge of the named plaintiffs. *See, e.g.*, Shoers Dec. at 1-3; Hickerson Dep. at 132, 143. While the court would prefer to see the kind of detailed showing the authorities made in *Higgins*, 1988 U.S Dist. LEXIS at 8-10, under the Ninth Circuit's interpretation of the first *Turner* factor in *Standing Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987), the court may "not require that prison

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Because *Sample v. Borg* was mooted when the plaintiffs were transferred to another facility, however, the case was vacated and accordingly has no precedential value.

officials demonstrate that the prisoners' religious practices are causally related to existing institutional problems," 831 F.2d at 1528. The plaintiffs in *Standing Deer*, like plaintiffs here, argued that the prison's mere statement that the proposed accommodation of inmate religious needs (the wearing of Indian headbands) would cause security and safety problems was insufficient to satisfy the first prong of the *Turner* test. 831 F.2d at 1528. The Ninth Circuit disagreed, noting the court's duty to defer to "the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions' to those problems." *Id.*, quoting *Turner*, 482 U.S. at 349. Under *Standing Deer* and *Turner*, therefore, the court is unable to find that the ban on the possession of religious articles is not logically connected to legitimate penological needs. *See also McCabe v. Arave*, 827 F.2d 634, 637 (9th Cir. 1987) (ban on inmate group worship not unconstitutional under *Turner* and *O'Lone*). In *Fromer v. Scully*, 874 F.2d 69, 74 (2d Cir. 1989) the Court of Appeals reversed a judgment in favor of an Orthodox Jewish inmate seeking to invalidate a prison ban on beards longer than one inch. The court found that under *Turner* and *O'Lone* "there was no burden on [defendants] to persuade the district court that its concerns were justifiable. Rather, the burden was on the plaintiff to show that these concerns were irrational." *Id.*

2. Availability of Alternative Means of Religious Exercise

Alternative means of practicing Catholicism clearly remain open to the plaintiff class, some in direct response

to this action. Mass is now held regularly at the jail. Transcript of October 24, 1988 Hearing ("Tr.") at 2-3. A separate room is available for that purpose. *Id.* at 3-4. A relatively private place for the sacrament of confession has been made available. *Id.* at 9-10. Inmates may meet in private with religious visitors. *Id.* at 6. Inmates may possess rosary beads and scapulars during mass, if the items are collected by the religious visitors after the service. Shores Dec. at 143. Defendants introduced evidence to show that neither rosary beads nor scapulars are central to the practice of Catholicism. Dec. of Father Wall at 2. It is entirely possible to pray the rosary without having rosary beads. *Id.* The court is unable to conclude that plaintiffs' practice of their religion is substantially infringed by the denial of rosary beads or scapulars.[3]

3. Impact of Accommodating the Right

Defendants allege that accommodating plaintiffs' request for religious articles would have a substantial impact on prison personnel and prison resources. Defendants claim in particular that allowing Catholic inmates

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[3] The court notes that even were the possession of rosary beads or scapulars central to the practice of Catholicism, their denial would not necessarily rise to the level of a constitutional deprivation. In *O'Lone*, the Supreme Court admitted that attendance at the weekly Jumu'ah service was "central" to the Muslim faith, 482 U.S. at 351, but nonetheless upheld the prison regulation which prevented the plaintiffs from participating in the service, noting that "respondents retain the ability to participate in *other* Muslim religious ceremonies. The record establishes that respondents are not deprived of *all* forms of religious exercise. . . . " *Id.* at 352 (emphasis added).

to possess these items would lead to a virtually endless chain of requests from other inmates of other faiths. Opp. to Plaintiffs' Motion at 15, or would create an impression of favoritism of Catholics. Defendants also warn of the administrative costs of requiring them to "account for, measure, weigh, assay, restrict . . . and police in general" additional items which might be added to the approved list of prisoner possessions. Opp. at 12 n.2.

The fear that perceived "special arrangements for one group would create problems" was accepted as a legitimate concern in evaluating the third *Turner* factor in *O'Lone*, 482 U.S. at 353. *See also Standing Deer*, 831 F.2d at 1529 (same). Administrative costs of inspection, as well, were considered in *Standing Deer*, 831 F.2d at 1529. Because it must defer to the professional judgment of prison administrators, *O'Lone*, 482 U.S. at 349, this court must accept the estimation of Alameda County officials regarding the administrative and other impact of allowing inmates to possess religious articles. The court therefore finds that, if defendants' professional judgment is accepted, accommodating plaintiffs' religious needs would have a cognizable negative impact on prison resources and administration.

4. Presence or Absence of Ready Alternatives

The find aspect of the *Turner* analysis requires that the court examine whether alternatives to the challenged rule exist. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Turner*, 482 U.S. at 90. If obvious alternatives exist, they

"may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

In the case at bar, plaintiffs suggested at the hearing that an alternative exists to the current total ban on inmate possession of religious articles. They suggested a modified rule allowing articles of certain specified dimensions and composition to be sent from religious organizations to inmates, much as books are now sent. Defendants, on the other hand, contend that the present policy of allowing inmates to use religious articles at certain times is itself a modification of the total ban existing at the outset of the suit. They object to the increased administrative tasks and costs which would be involved in establishing standards for acceptable religious items, as well as monitoring and inspecting them. The court notes that defendants' argument is flawed. Although any movement away from a total ban represents some accommodation, it may not, however, be sufficient to meet the *Turner* test.

Nevertheless, under *Turner*, 482 U.S. at 90, this court may not force defendants to adopt the least restrictive rule. "[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91. In this case, the court notes that not only has accommodation been made for regular services, but also the religious articles in question may be possessed by inmates during the services. Accordingly, the court finds that the accommodation made here satisfies *Turner* and even though less restrictive rules may be feasible, prison officials are not *required* to adopt such a policy.

CONCLUSION

Under the Supreme Court's test as established in *Turner v. Safley*, 482 U.S. 78, 89 (1987), the court is unable to find that the Alameda County Jail's failure to include rosary beads and scapulars on the list of items inmates may possess is unconstitutional. Given the deference to administrators' judgment required under *Turner* and *Standing Deer v. Carlson*, 831 F.2d 1525, 1528 (9th Cir. 1987), the court must accept defendants' representations regarding security and administrative costs. In addition, plaintiffs have failed to rebut defendants' evidence that both rosary beads and scapulars are merely optional items of Catholic faith. Plaintiffs retain the ability to practice Catholicism by attending Mass, praying the rosary with the aid of a rosary pamphlet, meeting with religious workers, receiving sacraments, and using rosary beads and scapulars during visits by religious workers.

The court grants summary judgment for defendants on the issue of religious articles and denies plaintiffs' motion for summary judgment. Defendants are to submit to the court within thirty (30) days of this order a written copy of the policy of the Alameda County Jail regarding the accommodation of the religious needs of inmates.

IT IS SO ORDERED

Dated: Sept. 29, 1989 Marilyn Hall Patel
United States District Court

APPENDIX G

Section III-5-15, Religious Services

The North County Jail Chaplain, in conjunction with the I.S.O. will schedule regular religious services for each level. Religious volunteers will go through security screening and training through the I.S.O. (See Section 3).

All materials brought into the jail for detainee's religious edification will be delivered to the I.S.O. and distributed by the I.S.O. No religious material or any other items will be given directly to the detainees by volunteers except that which has first gone through the I.S.O. Bibles are available in NCJ through I.S.O. Song books will be stored on each housing level for use during religious services. They will be distributed before each service and collected after each use. Detainees may use Bibles distributed to NCJ by the Gideons which are found on each Housing Level. No other items may be brought into the service and none may be taken from the service without prior approval and physical inspection by I.S.O.

All items approved and inspected by I.S.O. are subject to inspection by any deputy at any time, whether those items be in the hands of detainees or volunteers.

A schedule of regular and special religious services will be distributed to each housing level, all command personnel, and all control centers in the building, each Thursday prior to the week reflected on the schedule. All items appearing on the calendar will have been cleared by appropriate command personnel at least two weeks prior to printing.

All services will be conducted in an orderly manner. No service shall be conducted in such a manner as to disrupt

the smooth operation of the jail. Loud singing or speaking which produces an agitated atmosphere in the jail will not be tolerated.

Floor deputies are responsible for maintaining an atmosphere conducive to order and safety in the jail. Deputies will, therefore, warn or dismiss programs not adhering to this mandate.

Detainees wishing to speak with the Chaplain may fill out a message request form and send it through jail mail to the Chaplain's office.

APPENDIX H

OPERATIONAL ORDER NO. 1

PURPOSE:

To insure inmates are afforded the opportunity of religious worship.

POLICY:

Each staff member shall comply with the following order.

ORDER:

A. All religious services are under the direction of staff chaplain.

B. North County Jail has set aside regular hours each week for religious services.

C. Separate Catholic services will be allowed each Sunday between the hours of 7:30 to 9:30 a.m. in the multipurpose room on any floor in which any inmate(s) desiring to attend is housed, and Monday evenings, 7:30 p.m. to 9:30 p.m. in the multipurpose room, on the floor on which any inmate(s) desiring to attend is housed.*]

D. When an inmate notifies staff that he desires to practice his religion and requests to be administered to by his faith's practitioner, pursuant to North County Jail Inmate Rules and Regulations, page 1, staff shall make reasonable efforts to accommodate the request.

   1. If the inmate identifies a particular practitioner, staff will attempt to contact that practitioner.

   2. If the inmate does not identify a particular practitioner, staff will attempt to contact the religious body involved. [In the case of Catholic inmates,

staff will contact Catholic Charities, Diocese of Oakland.*]

E. Inmates may visit with their religious practitioner during normal visiting hours. Except in emergency situations, special visits between inmates and their religious practitioner shall be permitted when not in conflict with the facility's or the inmates' scheduled events.

F. When an inmate's religious practice calls for a private consultation with his religious practitioner, staff shall make every reasonable effort to make an area available for this purpose and shall use reasonable efforts to assure the privacy of the consultation. A private consultation" includes, but is not limited to, an inmate's confession to his practitioner.

* Since only Catholics are involved in this litigation, only the Catholic services are specified in Paragraphs C and D 2 of this Operational Order No. 1.

G. Because of the threat to security, inmates are not allowed to have any religious items of their faith in their possession except as follows:

1. Religious items allowed only during religious services are those which present only a moderate security threat. Examples include a rosary or a scapular. In this Paragraph G, "religious services" means special visits, private visits, Monday p.m. services and Sunday a.m. services.

2. Religious items not allowed in an inmate's possession even during religious services are items which present a serious threat to security. Examples of a serious threat to security include, but are not limited to, heavy metal items and sharp pointed items capable of being used as weapons, and items with a sharp edge capable of being used as weapons.

3. The religious practitioners holding the service are responsible for bringing in the desired religious item(s) and collecting and removing all of the same after the service.

4. Inmates are allowed to have religious literature upon their persons and within their cells. Except for religious literature distributed by the chaplain, the publisher-only rule applies.

H. All religious practitioners visiting a facility must undergo a background security check. After clearance, regularly attending religious practitioners will be issued an identification pass.

I. All religious practitioners entering a facility are subject to a physical search of their person and property.

The Hon. Marilyn Hall Patel, Judge
United States District Court
Northern District
Room 18425
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Jack Wayne Friend v. Ronald Kolodzieczak, et al
No. C-87-0161 MHP

Dear Judge Patel:

Enclosed please find he written policy of the North County Jail detailing current practice and procedure as it

impacts Catholic inmates pursuant to the hearing held in this matter on Monday, October 24, 1988.

Very truly yours,

BENNETT, SAMUELSEN, REYNOLDS & ALLARD

Richard L. Reynolds

RLR:ch

Encl.

cc: Amitai Schwartz, Esq.

APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.

Plaintiffs,

vs

RONALD KOLODZIECZAK, et al,

Defendants.

NO. C 87-0161 MHP
ORDER OF DISMISSAL

Pursuant to this court's order of September 29, 1989, granting defendants' motion for summary judgment, and denying plaintiffs' motion for partial summary judgment, on the issue of whether plaintiffs have a constitutional right to possess religious articies in the their cells at all times.

And pursuant to defendants' submission of the Alameda North County Jail Policy and Procedures Manual, Section III, 5-15 "Religious Services", revised 8/15/89, and defendants' representation that the same is the policy presently in effect,

And for good cause,

IT IS HEREBY ORDERED that this action is DISMISSED. Provided, however, that this dismissal is without prejudice to the right of plaintiffs, or any member of the plaintiff class, to bring any action in the future to redress any alleged violation of plaintiffs' right to religious exercise (except those matters resolved by the court's order granting summary judgment, filed September 29, 1989), including enforcement of Alameda North

County Jail Policy and Procedures Manual, Section III, 5-15 "Religious Services."

IT IS FURTHER ORDERED THAT the Court shall retain jurisdiction to determine the matter of attorneys' fees and costs.

DATED: Nov. 7, 1989

Hon. Marilyn Hall Patel
United States District Judge

APPENDIX J

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

-vs.-

RONALD KOLCDZIECZAK, et al.,

Defendants.

No. C-87-0161 MHP

MEMORANDUM AND ORDER

Plaintiffs, a class of all Roman Catholic inmates at Alameda North County Jail, seek attorney's fees under 42 U.S.C. section 1988. The parties were previously before this court on the parties' cross motions for summary judgment regarding plaintiffs' action for damages and injunctive relief for alleged violations of their First Amendment right to free exercise of religion, brought under 42 U.S.C. section 1983. On September 29, 1989 this court entered an order granting defendants' motion for summary judgment on the issue of whether inmates have a constitutional right to possess religious articles in their cells at all times. However, the court also required defendants to submit a written copy of the policy of the Alameda County Jail regarding accommodation of the religious needs of inmates. Plaintiffs' now bring this motion for 85% of the lodestar amount as prevailing parties by reason of having caused defendants to revise jail policy with regard to substantial part of the relief sought. Plaintiffs also seek reimbursement of costs and fees incurred in the filing of this motion. Having considered the submissions of the parties, for the following reasons, the court grants plaintiffs' motion for partial

attorney's fees in the amount of 85% of the lodestar amount. Plaintiffs are also entitled to reimbursement of costs and compensation for attorney's fees for time expended in seeking fees.

BACKGROUND

The facts of this case are treated in detail in this court's previous order. Briefly, plaintiffs sought the right to participate in the sacraments of the Catholic Church and to possess rosaries and scapulars in their cells.

At hearings on October 24, 1988 and March 13, 1989, the parties indicated to the court that all issues regarding religious access for inmates had been resolved. Defendants represented to the court that they were willing to allow inmates to use the religious articles under supervision, but that security and administrative concerns would not allow for the permanent possession of rosary beads and scapulars by inmates.

In this court's September 29, 1989 order, the court was unable to find that the Alameda County Jail's failure to include rosary beads and scapulars on the list of items inmates may possess was unconstitutional, or that plaintiffs' ability to practice Catholicism was violated by the policy of supervised use of scapulars and rosary beads.

In moving for partial fees as prevailing parties, plaintiffs claim that their lawsuit was the catalyst which caused defendants to revise the relevant jail policies. Defendants oppose any award of fees on the grounds that plaintiffs were not prevailing parties within the meaning of 42 U.S.C. section 1988. Defendants argue that should

the court determine that some fees are appropriate on the basis of partial success by the plaintiffs, any award should be substantially less than the amount that plaintiffs have requested.

LEGAL STANDARD

A district court may authorize an award of attorney's fees to a prevailing party in a civil rights action under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. section 1988. In the absence of special circumstances, a prevailing party should recover reasonable attorney's fees *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).

If the court determines that an applicant is a prevailing party who should be awarded attorney's fees under section 1988, it must next determine what fees are reasonable. In this circuit, reasonable attorney's fees are determined by first calculating the "lodestar." *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). The lodestar is found "by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate." *Chalmers*, 796 F.2d at 1210; *accord*, *Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir. 1987). There is a strong presumption that the lodestar figure represents a reasonable fee. *Jordan*, 815 F.2d at 1262.

In calculating the lodestar, the court must determine both a reasonable number of hours and a reasonable hourly rate for each attorney. *Chalmers*, 796 F.2d at 1210. In calculating a reasonable number of hours, the applicant must justify his claim by submitting detailed time

records. The court may adjust these hours downward if it believes the documentation to be inadequate, if the hours were duplicative, or if the hours were either excessive or unnecessary. Id.

Determining a reasonable hourly rate is a critical inquiry. *Jordan* 815 F.2d at 1262 (citing *Blum v. Stenson*, 464 U.S. 886, 895 n.11). The court must consider several factors, including the experience, skill and reputation of the applicant. *Chalmers*, 796 F.2d at 1210. The court must look to the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience and reputation; it may not refer to the rates actually charged to the prevailing party. *Id.* at 1210-11. It is the applicant's burden to produce evidence, other than the declarations of interested counsel, that "the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263.[1] In addition, in figuring a reasonable fee, the court should consider the outcome of the action, whether a contingent fee arrangement is involved, and the novelty or difficulty of the issues presented. *Chalmers*, 796 F.2d at 1211 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)); *Hamner v. Rios*, 769 F.2d 1404, 1407-09 (9th Cir. 1985).

DISCUSSION

I. PREVAILING PARTY

The parties dispute whether plaintiffs were prevailing parties within the meaning of section 1988. Plaintiffs

will be considered "prevailing parties" where they succeed on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Texas State Teachers Ass'n v. Garland Indep. School Dist.* ___ U.S. ___, 109 S. Ct. 1486, 1491 (1989) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433).

Plaintiffs claim to have achieved complete success on the issue of access to separate Roman Catholic services and private visits with clergy, and partial success on the issue of personal possession of rosary beads and scapulars.

Defendants admit that there was a substantial period of time preceding this litigation during which separate Roman Catholic services were unavailable to inmates at the North County Jail. Opp. at 4. Defendants' "defense" for this constitutional oversight is that "any deficiency or lack of Catholic services," was due to withdrawal of such services by the designated religious provider because of an unfilled chaplain's position, and by infighting between Protestant and Catholic representatives. Opp. at 3-4, 8. In other words, defendants cry, "it's not our fault."

Fortunately, a prevailing party analysis does not require this court to delve into defendants' bureaucratic morass. Aside from the fact that plaintiffs convincingly cite from the record facts which demonstrate that defendants' role in denying access was not in fact passive, a determination of whether or not defendants were at fault is not necessary. Reply at 1-3. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers*, ___ U.S. at ___, 109 S. Ct. at 1493 (1989).

Defendants argue that because this court made no finding of any constitutional violation, plaintiffs' did not prevail. Opp. at 5. This argument is not supported by Ninth Circuit law. Plaintiffs here sought a change in access to Roman Catholic services and sacraments at North County Jail as well as vindication of their first amendment right to free exercise of religion. First Amend. Compl. at 5, 8. During the course of the litigation the parties resolved the religious access issue. Sept. 29, 1989 Order at 2-3. Consequently, separate Catholic services are being held at North County Jail as of October 9, 1988. MPA. at 8. "Plaintiffs need not obtain formal relief in order to enjoy prevailing party status." *Sablan v. Department of Fin. of N. Mariana Islands*, 856 F.2d 1317, 1324 (9th Cir. 1988) (quoting *Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1986)). A district court may award attorney's fees where plaintiff's suit "has prompted defendants to take action." *Harris v. McCarthy*, 790 F.2d 753, 759 (9th Cir. 1986). It is clear to this court that plaintiffs' suit provided the impetus for defendants to more diligently attempt to arrange for the personnel and to coordinate the services necessary to bring North County Jail practice in line with plaintiffs' constitutional rights.[2]

Plaintiffs' partial success on the religious access matter has materially altered the North County Jail's policy by accommodating Catholic inmates' requests for participation in Roman Catholic services and sacraments. Opp. at 9. Plaintiffs have thus prevailed on a significant portion of the relief sought. This qualifies plaintiffs as "prevailing parties" within the meaning of § 1988. *See, Texas State Teachers*, ___ U.S. at ___, 109 S. Ct. at 1493. Thus, the

only issue remaining before the court after the October 24, 1988 and March 23, 1989 hearings was the right of plaintiffs to possess the specific religious articles.

Plaintiffs, while acknowledging that they did not prevail on the right to personal, in cell possession of rosaries and scapulars, claim partial success in gaining the right to supervised use of such items. MPA. at 6.

Defendants contend that the right to use religious paraphernalia during religious services pre-dated the lawsuit, and that the revised written policy submitted to the court merely embodied pre-existing policies. Opp. at 3. However, defendants' manual written prior to this litigation does not specifically include the right to use rosaries and scapulars, while the revised manual does so. *Compare* Brooks Dec., Ex. A-1, with Brooks Dec., Ex. B.

The court finds it interesting that defendants now characterize as a "recommendation," this court's *instruction* (under the threat of court action) to reduce to writing a clear policy regarding possession of rosaries and scapulars. Nonetheless, the fact is that North County Jail now explicitly recognizes plaintiffs' right to use these articles in a limited manner. Opp. at 12. Nor does the court find credible defendants' belated contention that Captain Hickerson did not mean "rosaries are not permitted in the jail" when he asserted in his sworn deposition that "rosaries are not permitted in the jail." Hickerson Dep. at 127-28, attached to Ochs Dec. as Ex. O; Opp. at 9.

Defendants argue that the only real result of this litigation was that defendants submitted to the court written policies of the North County Jail. Defendants imply that, because plaintiffs did not sue for a written jail

policy, they did not prevail. Opp. at 5, 12. By this approach, defendants pursue a classic "strawman" argument. They set up this court's order to submit the written policy as plaintiffs' only possible victory, only to knock it down as insignificant and unworthy of fees. This is clearly not the issue. Plaintiffs prevailed on the religious access issue and partially prevailed on the issue of prisoners' right to use religious articles.

Having determined that plaintiffs are prevailing parties for section 1988 purposes and are thus entitled to some award of attorney's fees, the court now turns to a determination of the size of a reasonable fee.

II. CALCULATION OF FEE AWARD

Plaintiffs claim a lodestar amount of $85,229.50.[3] MPA. at 13. Plaintiffs seek 85% of the lodestar amount, for an award of $72,445.00. Id. Plaintiffs' attorneys have submitted sufficiently detailed records to justify their claim. Plaintiffs' attorneys have also submitted the required evidence of the prevailing rate "in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263. Mayer, Turner and Specter Decs.

Defendants have failed to claim the plaintiffs' counsel expended unreasonable time or that their records are inaccurate. Nor have defendants submitted contradictory evidence as to prevailing rates in the community. Defendants instead contend that the court, in determining a reasonable award, should look to the amount of time spent and rates charged by defendants' counsel. This is not the accepted practice in this circuit.

Moreover, this court has taken into consideration defendants' vigorous resistance to plaintiffs' claims throughout this litigation, which made it necessary for plaintiffs' counsel to respond in kind. Where defendants have stubbornly avoided liability, the court must "take into account the time and effort they exact from their opponents." *Chalmers v. City of Los Angeles*, 676 F.Supp. 1515, 1524-25 (C.D. Cal. 1987); *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980).

Additionally, the litigation needs of both parties here were in no way equal; as only one example, plaintiffs' counsel spent a significant number of hours investigating and preparing the claims and application for class certification before defendants were even parties to the suit. Schwartz Dec. at 4; Ochs Dec. at 1-3. This court is satisfied that the $85,229.50 lodestar figure is reasonable.

Finally, this court must consider the overall results achieved by plaintiffs. *Hensley v. Eckerhart*, 461 U.S. at 435. The district court has wide discretion in determining the proper fee. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). This court finds that the issues in this action were related by virtue of their involving questions of first amendment violations created by the religious policies at North County Jail. Plaintiffs achieved the right sought to expanded access to Roman Catholic services and sacraments, and gained explicit, written acknowledgment of the right to at least limited use of rosaries and scapulars. In assessing the overall results achieved by plaintiffs, this court finds that plaintiffs' counsel are entitled to recover 85% of the lodestar amount, for an amount of $72,44500 plus costs of $6,462.22.

III. REIMBURSEMENT OF COSTS

Reimbursement for fees under section 1988 may take into account other expenses beyond the work product of the attorney. *Missouri v. Jenkins,* ___ U.S. ___, 109 S. Ct. 2463, 2470 (1989).

IV. COMPENSATION FOR FEES ON FEE MOTION

The law is clear in this circuit that plaintiffs are entitled to compensation for the costs of bringing a motion of this type. *Clark v. City of Los Angeles,* 803 F.2d at 992; *In re Nucorp Energy, Inc.,* 764 F.2d 655 (9th Cir. 1985).

CONCLUSION

Plaintiffs are entitled to recover reasonable attorney's fees and costs incurred in connection with the original litigation and this motion for fees. The court finds that the hours of work claimed by plaintiffs' counsel are a reasonable expenditure of time and that the rate of $140 per hour for Ms. Ochs and $235 per hour for Mr. Schwartz, for a total lodestar amount of $85,229.50 constitutes reasonable attorney's fees in accordance with prevailing rates in the area. This court also finds that plaintiffs are entitled to 85% of the lodestar amount, for an award of $72,445,00. Plaintiffs are additionally entitled to reimbursement of $6,462.22. Furthermore, the court finds that plaintiffs should-be awarded attorney's fees and costs for the expense incurred by the bringing of this motion.

IT IS HEREBY ORDERED THAT defendants pay the sum of $72,445.00 to plaintiffs as compensation for services rendered in connection with the original litigation;

and IT IS FURTHER ORDERED THAT defendants shall pay reasonable attorney's fees and costs to plaintiffs as compensation for the costs of pursuing this action in federal court. Plaintiffs have submitted the figure of $19,832.50 in connection with this motion for fees. In view of the court's finding above as to the reasonableness of the rate, the court will award fees at that rate. Defendants have ten (10) days from the date of this order to submit a response solely as to the reasonableness of the hours. If no response is filed, the total amount should be paid within forty-five (45) days of the date of this order.

IT IS SO ORDERED.

Dated: JUN. 19 90

MARILYN HALL PATEL
United States District Judge

ENDNOTES

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[1] In *Jordan*, the Ninth Circuit declined to consider the sufficiency of the evidence required to support a claimed fee. 815 F.2d at 1263 n.9. The court was inscrutable on the issue of whether a declaration stating the rate requested was comparable to the declarant's own rates would be sufficient. *Id.*

[2] Defendants, in trying to absolve themselves of "fault" for the conditions in the institution they are responsible for running, relate the following chronology: "*Prior* to the institution of this lawsuit, Captain Hickerson advised the Catholic Charities group that their request would be considered once a new chaplain was appointed. *After* this lawsuit was filed, a new chaplain . . . was appointed." (emphasis added) Defendants' Opp. at 3. Only then was the request for separate Roman Catholic services dealt with. Moreover, consideration of the chronology of events is proper in assessing the causative effects of plaintiffs' suit. *Sablan*, 856 F.2d at 1326. "[D]efendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways." Id. (quoting *Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983).

[3] Plaintiffs calculate this figure based on the following formula:

Amitai Schwartz:	79.7 hours	$235. per hour	$18,729.50
Su Ochs:	475 hours	$140. per hour	$66,500.00
TOTAL			$85,229.50

MPA. AT 13-

APPENDIX K

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

-vs.-

RONALD KOLCDZIECZAK, et al.,

Defendants.

No. C-87-0161 MHP

MEMORANDUM AND ORDER

Plaintiffs, a class of all Roman Catholic inmates at Alameda North County Jail, sought attorney's fees under 42 U.S.C. section 1988. In its order of June 20, 1990, this Court granted plaintiffs attorneys fees and costs incurred in connection with the original litigation. The court also ordered that defendants shall pay reasonable attorney's fees and costs as compensation for the costs of pursuing the motion for attorney's fees. Plaintiffs had submitted a figure of $19,832.50 (124.9 attorney hours – 24.7 hours expended by Mr. Schwartz and the 100.2 hours expended by Ms. Ochs). The court granted defendants ten days to respond only as to the reasonableness of the number of hours expended by plaintiffs' counsel.

Defendants responded that the 124.9 hours spent by plaintiffs' attorneys was unreasonable in light of the fact that defendants had only expended 43.4 hours responding to the motion. Although the court concurs that hours expended by Mr. Schwartz and Ms. Ochs seem immoderate, the court is not persuaded by defendants' argument that the motion was "simple" and that therefore plaintiffs' attorneys should reasonably only have spend 62.5 hours on it.

Accordingly, the court finds that it would have been reasonable for Mr. Schwartz to have spent 18.5 hours and Ms. Ochs to have spent 75.2 hours. Given a billable hourly rate of $235.00 per hour for Mr. Schwartz and a rate of $140.00 for Ms. Ochs, defendants shall pay the $72,445.00 incurred in connection with the original litigation and $14,875.50 for the costs associated with this motion, the total to be paid within forty-five (45) days of the date of this order.

IT IS SO ORDERED.

Dated: JUL. 10 1990

MARILYN HALL PATEL
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, et al.,

Plaintiffs,

-vs.-

RONALD KOLODZIECZAK, et al.,

Defendants.

No. C-87-0161 MHP

AMENDED MEMORANDUM AND ORDER

Plaintiffs, a class of all Roman Catholic inmates at Alameda North County Jail, sought attorney's fees under 42 U.S.C. section 1988. In its order of June 20, 1990, this court granted plaintiffs attorneys fees and costs incurred in connection with the original litigation. The court also ordered that defendants shall pay reasonable attorney's fees and costs as compensation for the costs of pursuing the motion for attorney's fees. Plaintiffs had submitted a figure of $19,832.50 (124.9 attorney hours – 24.7 hours expended by Mr. Schwartz and the 100.2 hours expended by Ms. Ochs). The court granted defendants ten days to respond only as to the reasonableness of the number of hours expanded by plaintiffs' counsel.

Defendants responded that the 124.9 hours spent by plaintiffs' attorneys was unreasonable in light of the fact that defendants had only expended 43.4 hours responding to the motion. Although the court concurs that hours expended by Mr. Schwartz and Ms. Ochs seem immoderate, the court is not persuaded by defendants' argument that the motion was "simple" and that therefore plaintiffs' attorneys should reasonably only have spent 62.5 hours on it.

Accordingly, the court finds that it would have been reasonable for Mr. Schwartz to have spent 18.5 hours and Ms. Ochs to have spent 75.2 hours. Given a billable hourly rate of $235.00 per hour for Mr. Schwartz and a rate of $140.00 for Ms. Ochs, defendants shall pay the $72,445.00 incurred in connection with the original litigation and $14,875.50 for the costs associated with this motion, as well as $6,462.22 as reimbursement for out of pocket costs in the original litigation, the total to be paid within forty-five (45) days of the date of this order.

IT IS SO ORDERED.

Dated: JUL 18, 1990

MARILYN HALL PATELL
United States District Judge

APPENDIX M

A103

DIOCESE OF OAKLAND
2900 Lakeshore Avenue, Oakland, California 94610-3697
415/893-4711

April 7, 1987

Captain Morris Hickerson
North County Jail
550 6th Street
Oakland, CA 94607

Dear Captain Hickerson:

I would like to take this opportunity to communicate to you our designation of Mr. Jim Rodgers as detention minister of the Diocese of Oakland at the North County Jail. I realize that Mr. Rodgers has been ministering at the jail since the first of the year. I felt it was important to inform you in a more formal way.

I am pleased that developments in the diocesan detention ministry program now allows for a Catholic presence in the North County Jail, expanding upon ministry already present in other institutions within the diocese. Mr. Rodgers has been an employee of Catholic Charities for over nine years and brings with him the experience of four years as the diocesan detention minister at the Alameda County Juvenile Hall.

I understand from him that he and future volunteers will be ministering within an inter-denominational Christian service, under the coordination of Fr. Alan Ford. This arrangement matches this diocese's commitment to ecumenical cooperation.

We appreciate your cooperation in creating access for the Catholic community to the North County Jail and the prisoners held there.

Sincerely,

John S. Cummins
Bishop of Oakland

pr
cc: Mr. Ken Reggio
Executive Director
Catholic Charities
Fr. Alan Ford

APPENDIX N

RICHARD J. MOORE
County Counsel
County of Alameda
1221 Oak Street, Suite 463
Oakland, California 94612
Telephone: (415) 272-6700
By: KELVIN H. BOOTY, JR.
Assistant County Counsel

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK FRIEND, MICHAEL WETHERN, JEFFREY GRAY

Plaintiffs,

v.

RONALD KOLODZIECZAK, HAROLD ESTES, CHUCK GREEN, R. A. FRIST, A. THEOBALD,

Defendants.

No. C 87-0161 MHP

ANSWER TO COMPLAINT

Come now defendants Ronald Kolodzieczak, Harold Estes, Chuck Green, R. A. Frist and A. Theobald, in answering the complaint on file herein, admit, deny, and allege as follows:

1. Answering the allegations of paragraph III B and C of the complaint, defendants admit that the named defendants are, and each of them is, an employee in the Sheriff's Department of the County of Alameda.

2. Answering the allegations of paragraph IV B of the complaint, defendants allege that it is true that inmates are not allowed to have rosary beads in their possession in the jail. It may also be true that rosary beads were removed from plaintiff Jeffrey Gray, and placed in the place where the property he cannot have in his possession is being held for him.

It also appears that a rosary was removed from plaintiff Michael Wethern. Michael Wethern is no longer in the custody of the Sheriff of Alameda County, and accordingly the complaint is moot as to him, since no damages are sought.

It is true that inmates are not allowed to wear clothing other than that issued by the Alameda County Sheriff's Department, and no inmate is allowed to have in his possession any type of jewelry in the form of necklaces, medallions, medals, and similar items. Each of these is capable of being used as money to pay gambling debts, or traded for other contraband such as drugs, and some of these items can be used as weapons either as they are or as modified. A chain or necklace, including a rosary, can be used to strangle another or oneself. In addition, jewelry, including rosary beads, can be the subject of theft. Theft leads to controversy and fights within inmate groups, and implicates the safety of the staff and of the inmates. Accordingly, there are significant and serious security reasons for the removal of any items such as those which have been described.

In addition, plaintiff Wethern was housed in a protective custody unit which, among other things, houses inmates who are in danger from others in the inmate

population. It is particularly important that no potential weapons be allowed in that unit.

3. Further answering the allegations of paragraph IV, it is not true that anyone has denied any of the plaintiffs, or any other inmates, access to religious services and observances, insofar as the same are available in the jail. Religious services for inmates at North County Jail are provided in accordance with the requirements of sections 1070 and 1072 of the California Minimum Jail Standards, Title 15, California Administrative Code. Religious services and counseling are provided in several ways: a jail chaplain; volunteer groups; and requests for individual visits by a minister or priest of the inmate's choice.

The North County Jail employs a chaplain on a half-time basis, twenty hours per week. There is a full-time chaplain at Santa Rita. (At present, the chaplain position at North County Jail is vacant, since the incumbent resigned. The civil service system for the county is in the process of recruiting and testing applicants for the position, and the sheriff will be allowed to choose from the top five when a personnel list has been promulgated.) The chaplain's normal duties encompass the entire range of religious services, with emphasis on the provision of individual contact with inmates in the coordination of volunteer services. Based on administrative reports by the chaplain, personal contacts with inmates average in excess of 50 per week. Requests for special religious services are handled by the chaplain. In the absence of an employed chaplain, the Inmate Services Officer has been

handling requests and a religious presence has been provided by one of the volunteer ministers who is in the jail approximately three days a week.

The volunteer groups referred to previously are:

(1) Non-denominational services are provided by Follow-up Ministries of Castro Valley headed by the Reverend Glenn Morrison. He has conducted programs in Alameda County jails and in the state prison system for many years. This group provides a non-denominational service on Sunday mornings and a Bible study class on Monday evenings. There are also services on Wednesdays and Thursdays. Normally a minimum of six ministers will attend and one will go to each floor of the jail to meet with inmates who wish to attend services or participate in the study group.

(2) Roman Catholics are assisted by arrangements with the Diocese of Oakland through the Catholic Charities Office for Prisoner and Community Justice located on Jefferson Street in Oakland. Normally two to four persons from Catholic Charities are in the jail on Sunday mornings to provide services for those who wish to attend. Communion is provided by this group upon request of the innate. Requests for visitation or other religious services at times other than Sunday mornings are also handled by Catholic Charities.

In addition to the foregoing, requests by inmates for religious counseling or special needs other than provided in the scheduled services are coordinated by the Inmate Services Officer. The inmate sends a request slip to the Inmate Services Officer who will make the arrangements with one of the religious volunteer groups or a personal

minister or priest if requested. Follow Up Ministries and Catholic Charities have been very responsive to requests from the inmates. Defendants are not a aware of any instances where a request by an inmate has not been answered by either group. In addition, since the inmates have almost unlimited access to telephones in their living area, they can make whatever calls to spiritual advisors they may wish.

There is attached hereto page 1 of the General Information and Rules for North County Jail, which indicates the kinds of services available and to whom the requests should be made. Page 8 is also attached, as that is concerned with the chaplain and with inmate services.

4. Except as herein alleged, defendants deny the allegations of the complaint.

WHEREFORE, defendants pray that plaintiffs take nothing by reason of the complaint, and for such other relief as the court may grant.

Dated: October 22, 1987

RICHARD J. MOORE, County Counsel
in and for the County of State of California

By: KELVIN H. BOOTY, JR.,
Assistant County Counsel

Attorneys for Defendants

RELIGIOUS
VOLUNTEER MANUAL
APRIL 1987
Exhibit 19, Defendants' Motion for
Summary Judgment

CONTENTS

FORWARD
ROLE OF THE RELIGIOUS VOLUNTEER
IN THE ALAMEDA COUNTY JAIL SYSTEM
PURPOSE OF CHAPLAINCY
PHILOSOPHY OF CHAPLAINCY
RULES, REGULATIONS AND DIRECTIVES
SANTA RITA JAIL ADDENDUM
GUIDELINES OF THE RELIGIOUS VOLUNTEER
GLOSSARY OF TERMS
NOTE

APPENDIX O

Sheriff's Department

January 12, 1988

Mr. James F. Rodgers Office for Prisoner & Community Justice Catholic Charities 433 Jefferson St. Oakland, CA 94607

Dear Mr. Rodgers

My apologies for the delay in responding to your letter of 12-12-87. My absence from the office has been the cause.

As you are aware, North County Jail has been without a Chaplain for some period of time. Due to a hiring freeze, we were unable to fill the Chaplain's position after the resignation of Chaplain Ford. Most recently, a delay has been caused by the process of upgrading the position to a full-time position and some changes in the requirements for persons applying. I am happy to state that the process is near completion and we should be getting close the point of testing and hiring.

I understand the concerns expressed in your letter. I am sure you will understand my reluctance to make any changes in the religious program at the jail without the benefit of a person in the Chaplain's position who will ultimately be responsible for the program.

If I may ask for your patience, I do not intend to alter the program until the Chaplain's position is filled and the person hired has an opportunity to familiarize himself or herself with the needs of the inmates and the jail.

If I may be of further assistance in this matter, please do not hesitate to make contact.

Cordially yours,

M. H. HICKERSON, CAPTAIN
NORTH COUNTY JAIL

MLH:ms cc: Charles C. Plummer, Sheriff

0875a

APPENDIX P

Amitai Schwartz
Sue Ochs
Law Offices of Amitai Schwartz
155 Montgomery Street, Suite 800
San Francisco, California 94104
415/398-0922

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JACK WAYNE FRIEND, on behalf of himself and all others similarly situated, JEFFREY DEE GRAY, and MICHAEL WETHERN,

Plaintiffs

vs.

RONALD KOLODZIECZAK, CHARLES PLUMMER, Sheriff of Alameda County; MORRIS L. HICKERSON, Captain of Alameda North County Jail, DEAN COMPTON, Deputy for Prisoners' Affairs-Inmate Services Officer; HAROLD ESTES, R.A. FRIST, CHUCK GREEN, A. THEOBALD, and COUNTY OF ALAMEDA,

Defendants.

NO. C 87-0161 MHP

DECLARATION OF AMITAI SCHWARTZ IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Date: May 16, 1988
Time: 10:30 a.m.
Courtroom: 5

I, Amitai Schwartz, hereby declare:

1. I am a member of the bar of this Court and the lead attorney for the plaintiffs herein. I make this declaration in support of plaintiff JACK WAYNE FRIEND'S motion for class certification.

2. I am qualified to represent the proposed class in this matter. I am an attorney at law and a member of the State Bar of California. I am a member of the Bar of the United States District Courts for the Northern, Eastern and Central Districts of California, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the 61 United States.

3. I graduated with a J.D degree from the University of California, Berkeley (Boalt Hall) in 1972. From July of 1985 9 to the present time I have maintained a private law practice 10 in San Francisco. During the fall of 1985 I also taught the 11 appellate advocacy course at Boalt Hall as a visiting lecturer.

4. From July 1977 to July 1985 I was staff counsel for the American Civil Liberties Union (ACLU) of Northern California, which has its headquarters in San Francisco. While serving as staff counsel at the ACLU I litigated a wide variety of civil liberties matters involving complex civil litigation and appellate work, including challenges to local policies and practices under a great number of different 20 circumstances involving numerous constitutional and statutory issues.

5. Prior to beginning work as staff counsel for the ACLU of Northern California, I was the legal director of the Northern California Police Practices Project, a project of the ACLU of Northern California, the Mexican American Legal Defense and Educational Fund, and the NAACP Legal Defense Fund.

I have served as a faculty lecturer and prepared published written material on many occasions in connection with Section 1983 civil rights litigation for the Practicing Law Institute (1977, 1979, 1982, 1985, 1986, and 1987). I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 18th day of April, 1988.

Amitai Schwartz

DECLARATION OF
AMITAI SCHWARTZ

APPENDIX Q

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
MARILYN HALL PATEL, JUDGE

JACK WAYNE FRIEND, et al,

Plaintiffs, NO. C-87-0161 MHP

-vs.-

RONALD KOLODZIECZAK, et al.,

Defendants.

SAN FRANCISCO, CALIFORNIA
MONDAY, OCTOBER 24, 1988

APPEARANCES:

FOR PLAINTIFFS:
LAW OFFICES OF AMITAI SCHWARTZ
155 MONTGOMERY STREET
SUITE 800
SAN FRANCISCO, CALIFORNIA 94104

BY: AMITAI SCHWARTZ, ESQ.
SUE OCHS, ATTORNEY AT LAW

FOR DEFENDANTS:
BENNETT, SAMUELSEN, REYNOLDS
& ALLARD
1951 WEBSTER STREET
SUITE 200
OAKLAND, CALIFORNIA 94612-200

BY: RICHARD REYNOLDS, ESQ.
MAUREEN BROOKS, ATTORNEY
AT LAW

REPORTED BY:
CANDACE L. FRANCIS, CSR, CP, CM
OFFICIAL REPORTER, USDA

COMPUTERIZED TRANSCRIPTION
BY XSCRIBE

MONDAY, OCTOBER 24, 1988 11:08 A.M.

THE CLERK: CIVIL ACTION 87-161, FRIEND, ET AL. VERSUS KOLOGZIECZAK FOR PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFFS' MOTION TO STRIKE THE DECLARATION OF CAPTAIN TOM SHORES.

COUNSEL, YOUR APPEARANCES, PLEASE.

MR. SCHWARTZ: GOOD MORNING, YOUR HONOR. AMITAI SCHWARTZ AND SUE OCHS FOR THE PLAINTIFFS.

THE COURT: GOOD MORNING.

MR. REYNOLDS: GOOD MORNING, YOUR HONOR, RICHARD REYNOLDS AND MAUREEN BROOKS FOR THE DEFENDANTS.

THE COURT: GOOD MORNING.

LET ME FIND OUT WHERE THINGS STAND RIGHT NOW, BECAUSE IT LOOKS AS IF PERHAPS A LOT OF THINGS HAVE BEEN WORKED OUT OR MAY BE IN THE PROCESS OF BEING WORKED OUT.

EXACTLY WHAT IS GOING TO BE THE POLICY WITH RESPECT TO THE AVAILABILITY OF RELIGIOUS SERVICES, SACRAMENTS, ET CETERA, IN CONNECTION WITH – FOR CATHOLIC INMATES?

MR. REYNOLDS: YOUR HONOR, IT'S MY UNDERSTANDING THAT THE SUNDAY MORNING AND MONDAY EVENING TIME SLOTS ARE AVAILABLE FOR STRICTLY CATHOLIC SERVICES BY, PRESENTLY, EUGENE ESTELLY, THE DEACON, AND WHOEVER HE WANTS TO BRING IN ON THOSE TIMES AND THOSE DAYS OF THE WEEK TO PERFORM A SEPARATE CATHOLIC SERVICE FOR WHOEVER WANTS TO ATTEND IS ACCEPTABLE TO THE JAIL.

THE COURT: NOW, THAT'S SUNDAY AT WHAT TIME?

MR. REYNOLDS: I BELIEVE 7:00 TO 9:30.

MR. SCHWARTZ: 7:00 TO 9:30.

THE COURT: 7:00 TO 9:30 IN THE MORNING.

MR. REYNOLDS: THAT'S CORRECT.

THE COURT: IS THAT THE TIME THAT'S GENERALLY AVAILABLE ALSO FOR OTHER WORSHIP SERVICES, PROTESTANT SERVICES OR WHATEVER?

MR. REYNOLDS: YES. ALL RELIGIOUS SERVICES ARE AVAILABLE AT THAT TIME.

THE COURT: AND THERE WILL BE A SEPARATE ROOM AVAILABLE FOR THESE PEOPLE –

MR. REYNOLDS: THAT'S CORRECT, YOUR HONOR.

THE COURT: – FOR THAT PURPOSE.

AND WHAT WAS THE OTHER TIME?

MR. REYNOLDS: MONDAY EVENINGS AT, I BELIEVE, 7:00 TO 9:00 OR 6:30 TO 9:00, I BELIEVE.

THE COURT: NOW, IS THAT – IS THAT THEN ALLOWING FOR ABOUT THE SAME AMOUNT OF TIME THAT'S ALLOWED FOR OTHER RELIGIOUS GROUPS TO HOLD SERVICES?

MR. REYNOLDS: ABSOLUTELY, IT'S THE SAME TIME SLOT FOR EVERYBODY.

THE COURT: UH-HUH.

MR. REYNOLDS: AND IF THEY NEED A SEPARATE ROOM THE JAIL HAS INDICATED THEY WILL MAKE THAT ACCOMMODATION FOR THE CATHOLIC GROUP TO HAVE THEIR OWN SEPARATE ROOM FOR WHOEVER WANTS TO COME IN THAT GENERAL AREA, IN THE SEGREGATED AREA.

I BELIEVE THAT EACH FLOOR IS SPLIT IN TWO, SO IF THEY WANT TO SAY THE NORTH CELLS HAVE PEOPLE ASSEMBLED THERE, THERE WILL BE A SEPARATE ROOM FOR EITHER CATHOLIC INMATES OR PEOPLE WHO WANT TO AVAIL THEMSELVES OF THE CATHOLIC SERVICE, THAT WILL BE AVAILABLE OR IS AVAILABLE, I BELIEVE, AS OF OCTOBER 7TH, THAT WAS THE LAST SUNDAY.

MR. SCHWARTZ: 9TH.

MR. REYNOLDS: 9TH.

THE COURT: OKAY, AS FAR AS WHAT HAS BEEN WORKED OUT, AS FAR AS YOU UNDERSTAND, MR. SCHWARTZ, DOES THAT SATISFY THE – YOU KNOW, WHAT WAS BEING SOUGHT WITH RESPECT TO, AND PROVIDE EQUAL ACCESS TO, ET CETERA,

AVAILABILITY OF RELIGIOUS SERVICES FOR CATHOLIC INMATES OR THOSE WHO WISH TO ATTEND CATHOLIC SERVICES?

MR. SCHWARTZ: WELL, WE'RE ON THE WAY, YOUR HONOR.

THE COURT: HOW ABOUT – HOW ABOUT OTHER – OTHER – HOW ABOUT SACRAMENTS? DOES THAT PRESENT SOME – SOME PROBLEM?

MR. SCHWARTZ: WELL, SOME OF THEM DO AND SOME OF THEM DON'T.

THE – SOME OF THE SACRAMENTS APPARENTLY CAN BE GIVEN BY THE LAY MINISTERS AND BY THE DEACON. I THINK THE PRINCIPAL PROBLEMS IS IN CONNECTION WITH THE GIVING OF MASS AND THE – THE CONFESSION.

THE COURT: AND WHAT IS THE PROBLEM WITH RESPECT TO THE MASS?

MR. SCHWARTZ: WELL, IT HAS TO BE GIVEN BY A PRIEST, AS I UNDERSTAND IT.

THE COURT: BUT THE PRIEST CAN HAVE ACCESS –

MR. SCHWARTZ: YES.

MR. REYNOLDS: SURE.

THE COURT: – RIGHT?

MR. SCHWARTZ: YES.

THE COURT: SO IS THERE – ONCE THERE IS A PRIEST, YOU KNOW, WHO IS AVAILABLE TO GO IN,

I PRESUME THAT – THAT, UNDER THIS POLICY, HE WILL BE ALLOWED IN.

MR. REYNOLDS: ABSOLUTELY.

THE COURT: IS THERE ANYTHING THAT – ABOUT – THAT – THAT OTHERWISE IMPAIRS HIS ABILITY TO PRESIDE OVER MASS?

MR. SCHWARTZ: NO, SO LONG AS THERE IS THE SEPARATE – THE SEPARATE PLACE AND THE SEPARATE TIME, THERE SHOULD NOT BE A PROBLEM.

THE COURT: AND THAT'S GOING TO BE WORKED OUT.

MR. REYNOLDS: THERE IS A SEPARATE PLACE, YOUR HONOR, AS FAR AS THE TIME, THE TIME SLOT IS THE SAME.

THE COURT: YEAH.

MR. REYNOLDS: WHAT WE'VE FORMALLY DONE IS SAY, IF YOU WANT TO BE SEPARATE, WE CONTEND YOU'VE HAD THAT RIGHT ALL ALONG, WE CONTEND THAT THEY ORIGINALLY JOINED THIS INTERDENOMINATIONAL GROUP THAT DIDN'T WORK OUT.

THERE'S BEEN A LOT OF CONFUSION. THERE'S BEEN A LOT OF PROBLEMS, BUT IF THIS IS WHAT THEY WANT, THE JAIL HAS NORMALLY IN WRITING SAID, YOU CAN HAVE YOUR SEPARATE PLACE. IT'S GOING TO BE ON SUNDAY MORNINGS, BUT HERE IS

YOUR PLACE TO SAY MASS, AND THERE'S NO PROBLEM WHATSOEVER WITH A PRIEST SAYING MASS IN JAIL.

THE COURT: AND THERE'S NO PROBLEM, AS FAR AS THE SERVICES ARE CONCERNED – ALTHOUGH I REALIZE THAT'S ANOTHER ISSUE HERE – HAVING THE VARIOUS ACCOUTREMENTS OF THE SERVICE, SUCH AS ROSARIES AND SO FORTH, FOR THE SERVICES THEMSELVES.

MR. REYNOLDS: ROSARIES CAN BE USED IN THE SERVICES, ABSOLUTELY.

THE COURT: OKAY.

THE COURT: I UNDERSTAND THAT, I UNDERSTAND THAT, BEFORE WE LEAVE HERE TODAY, THAT WE DO SOMETHING ABOUT THAT. BUT I WANTED TO GET THROUGH ALL OF THESE ISSUES.

AND I THINK THE ONLY OTHER TWO THAT ARE LEFT – ONE REALLY – IS THE AVAILABILITY OF SOME OF THE THINGS – I GUESS SPECIFICALLY ON THE TWO, THE ROSARIES, THE RIGHT TO PETITIONERS TO HAVE ROSARIES OR SCAPULARS AVAILABLE TO THEM AS POSSESSIONS OUTSIDE OF SERVICES, CORRECT?

MR. SCHWARTZ: CORRECT.

THE COURT: THE IMPRESSION THAT I GOT WAS ESSENTIALLY – FROM DEFENDANTS' PAPERS IS ESSENTIALLY VERY IMPRESSIONISTIC, THAT THERE WASN'T ANY REALLY HARD DATA OR EVIDENCE TO SUPPORT THE FACT THAT, WHEN PETITIONERS OR

PRISONERS AT ONE TIME WERE ALLOWED TO HAVE ROSARIES AND WERE ALLOWED TO HAVE SCAPULARS, THAT SOMEHOW THAT PRESENTED SOME DANGER.

MR. REYNOLDS: OH, I DON'T BELIEVE THERE'S EVER – THEY'VE EVER BEEN ALLOWED, THERE MAY HAVE BEEN A TIME WHEN INSTANCES OCCURRED WHERE THEY WERE IN THE POSSESSION OF THE INMATE AND, IN THE DAY-TO-DAY ADMINISTRATION OF THE JAIL, THAT PERHAPS WAS NOT THE MOST PRESSING CONCERN TO ENFORCE THAT ON THAT PARTICULAR DAY.

MR. COURT: UH-HUH.

MR. REYNOLDS: HOWEVER, THE POLICY HAS CONSISTENTLY BEEN THAT THESE ITEMS OF PERSONAL PROPERTY, ANYTHING THAT IS NOT SPECIFICALLY ALLOWED IN THE POSSESSION OF THESE INMATES, IS CONSIDERED CONTRABAND BY THE JAIL.

THE COURT: UH-HUH.

MR. REYNOLDS: NOW, THE –

THE COURT: WELL, LET ME ASK YOU THIS.

MR. REYNOLDS: – EVIDENCE IS –

THE COURT: THE QUESTION IS, IF THESE, ARE, IN FACT, ALBEIT MAYBE OPTIONAL, NEVERTHELESS APPROPRIATE RELIGIOUS OBJECTS, THAT THERE OUGHT TO BE SOME BASIS, SOME EVIDENCE, ON WHICH – ON WHICH TO EXCLUDE THEM.

MR. REYNOLDS: WELL, THE EVIDENCE, YOUR HONOR, IS THE OPINION OF THE JAIL ADMINISTRATORS WHO HAVE EDUCATION AND EXPERIENCE –

THE COURT: UH-HUH.

MR. REYNOLDS: – AND HAVE ARRIVED AT THIS CONSIDERED JUDGMENT THAT THIS IS THE PROBLEM. AND I –

THE COURT: BUT WHERE IS THE EVIDENCE THAT, IN FACT, ROSARIES COULD BE USED AS SOME KIND OF A WEAPON?

MR. REYNOLDS: WELL, YOU HAVE POLICE OFFICERS WHO HAVE DEDICATED THEIR LIVES TO THE ADMINISTRATION OF A JAIL WHO SAY THESE ARE THE TYPES OF ITEMS THAT CAN BE USED.

THE COURT: OH, I'VE HAD – I'VE HEARD OFFICERS SAY ALL KINDS OF THINGS. I WANT SOME HARD DATA.

I MEAN, YOU CAN – YOU KNOW, ANY OF US CAN EXPOUND ON SOMETHING AND WE SAY IT'S BASED UPON OUR EXPERIENCE, BUT I WANT TO SEE SOME EVIDENCE OF IT.

I MEAN, THERE ARE OFFICERS IN SOME JAILS WHO WILL ALLOW CERTAIN KINDS OF PENS AN D, IN OTHER JAILS, THEY WON'T ALLOW THEM. THEY'LL ALLOW PENCILS IN ONE BUT THEY WON'T ALLOW THEM IN OTHERS. EVERYBODY HAS THEIR OWN PERCEPTION, I SUPPOSE, OF WHAT IS DANGEROUS. BUT –

MR. REYNOLDS: I AGREE, YOUR HONOR, THAT IS –

THE COURT: BUT IF YOU HAVE A ROSARY THAT IS NOT OVER A CERTAIN LENGTH, THAT IS MADE OF PLASTIC, THEN I DON'T SEE HOW IT COULD POSSIBLY BE USED TO STRANGLE SOMEONE IF IT'S NOT LARGE ENOUGH TO GO OVER A HEAD.

MR. REYNOLDS: WELL IT CAN BE. IT CAN BE CUT AND USED.

THE COURT: HOW IT COULD BE USED AS A WEAPON?

MR. REYNOLDS: IT – YOUR HONOR, THOSE ROSARIES ARE EASILY CUT. THERE'S NO REASON NOT TO HAVE SEVERAL ROSARIES AND BE ABLE TO DO ALL SORTS OF THINGS WITH ROSARIES.

WE'VE HAD CASES OF NEWSPAPERS ROLLED TIGHT AND USED AS A WEAPON.

I'D LIKE THE RECORD TO REFLECT THAT COUNSEL, OF COURSE, HAS A ROSARY HERE, BUT . . . MR. SCHWARTZ.

BUT THESE THINGS – AH, THE OTHER PROBLEM, OF COURSE, YOUR HONOR, IS THAT –

THE COURT: WELL, TECHNICALLY ANYTHING COULD BE USED, I SUPPOSE, IF YOU BECOME INVENTIVE ENOUGH.

DOES THAT MEAN YOU HAVE PEOPLE RUNNING AROUND IN JAIL NUDE WITHOUT ACCESS TO ANYTHING?

MR. REYNOLDS: NO, IT'S IN THE DISCRETION OF THE JAIL ADMINISTRATORS. THEY MAKE A JUDGMENT ON THESE THINGS AND, OF COURSE, OUR ISSUE, WHILE BEING PRESENTED BY THE PLAINTIFFS AS ROSARIES OR SCAPULARS, IT CAN'T END THERE.

BY THE VERY NATURE OF THE JAIL SYSTEM, WE CANNOT JUST SAY, "IT'S THE END." AT ROSARIES OR SCAPULARS. THE FLOODGATES ARE BASICALLY OPEN TO THE ADMINISTRATORS OF THE JAIL TO, INSTEAD OF DEALING WITH A CURRENT LIST OF A FINITE NUMBER OF ITEMS THAT ARE PERMITTED IN THE INMATE PERSONAL PROPERTY, IT WILL BECOME INFINITE AND WILL CREATE AN ADMINISTRATIVE AND SECURITY NIGHTMARE. THAT'S THE OTHER PROBLEM THAT WE HAVE.

THE COURT: WELL, I'VE HEARD TWO ARGUMENTS. NEITHER OF WHICH WASH, BUT I HEAR EVERY TIME THE FLOODGATE ARGUMENT, AND ALL OF THE EXPERIENCE I'VE HAD IN THE FIELD, YOU KNOW, ALL THESE YEARS.

I DON'T SEE ANY HARD DATA, THERE ARE NO FLOODGATES INVOLVED HERE THERE ARE TWO ITEMS AND ONLY TWO ITEMS THAT ARE AT ISSUE.

AND UNLESS I SEE SOME HARD EVIDENCE THAT, IN FACT, THERE IS A RATIONAL BASIS FOR THAT ARGUMENT, I'M NOT PERSUADED.

THE COURT: WELL, I'LL TELL YOU WHAT I'M GOING TO DO, COUNSEL: I MEAN, I COULD, YOU KNOW, I SUPPOSE, LAY DOWN SOME POLICIES AND

SO FORTH. I DON'T THINK THAT IT'S APPROPRIATE TO DO THAT UNTIL THERE HAS BEEN A CLEAR FAILURE, UNWILLINGNESS TO COMPLY, BY THE COUNTY, AND I WOULD LIKE TO GIVE THEM THAT CHANCE, BUT I DO, YOU KNOW, AGREE THAT SOMETHING HAS TO BE IN WRITING.

WE'RE TALKING ABOUT THE DAY-TO-DAY OPERATIONS OF AN INSTITUTION WHERE YOU HAVE DIFFERENT PEOPLE COMING ON IN DIFFERENT SHIFTS AND WHO MAY HAVE DIFFERENT INTERPRETATIONS OF WHAT A, QUOTE, POLICY IS.

SO WHAT I AM GOING TO DO IS ASK THAT – THAT THE DEFENDANTS COME UP WITH, IN WRITING, A POLICY THAT ADDRESSES THE ISSUES IN THIS CASE. I MEAN, IF YOU WANT TO WORK IT IN WITH, YOU KNOW, ANOTHER STANDING POLICY, OBVIOUSLY, THAT'S PROBABLY PREFERABLE FOR YOUR MANAGEMENT PURPOSES, BUT I'M ONLY CONCERNED ABOUT THOSE ISSUES THAT ARE ADDRESSED HERE

AND I WANT TO GIVE YOU A CHANCE TO DO THAT FIRST RATHER THAN MY DOING IT. I DON'T WANT TO RUN THE JAIL OR THIS ASPECT OF IT, OR WHATEVER, BUT IF THERE'S A FAILURE OF WILL ON YOUR PART, THEN I'LL HAVE TO DO SOMETHING ABOUT IT.

AND I WOULD ALSO SUGGEST THAT YOU SOLICIT THE INPUT OF MR. SCHWARTZ IN CONNECTION WITH IT SO THAT, WHEN YOU DO SUBMIT IT, YOU KNOW, IT WILL NOT BE FULL OR A LOT OF

HOLES THAT MR. SCHWARTZ CAN THEN TAKE – YOU KNOW, TAKE SHOTS AT.

AND THAT IS THAT YOU REDUCE TO WRITING THE POLICY WITH RESPECT TO SEPARATE LOCATION AND A SPECIFIC TIME FOR SERVICES FOR CATHOLIC INMATES, AND THE TYPE OF PLACE WHERE THAT – WHERE THOSE SERVICES WILL BE HELD, AND THOSE WHO WILL BE GIVEN ACCESS TO THE JAIL FOR THE PURPOSE OF CONDUCTING THOSE SERVICES, AND THE OTHER ITEMS, SACRAMENTS AND SO FORTH. THAT – AND ITEMS FOR THOSE SACRAMENTS THAT WILL BE PERMITTED IN THE SERVICES, THAT . . . THE POLICY WITH RESPECT TO A PLACE FOR CONFESSION BE REDUCED TO WRITING.

AND THE ONLY THING I AM GOING TO ORDER IN CONNECTION WITH THAT, WITHOUT GETTING INTO ANY DETAIL UNTIL I SEE WHAT YOU SUBMIT, IS THAT IT MUST PROVIDE FOR PRIVACY BETWEEN THE PENITENT AND THE PRIEST. I AM LESS CONCERNED WITH THE GLASS WINDOW BEING BETWEEN THE TWO OF THEM SO LONG AS THERE IS PRIVACY. IN OTHER WORDS, OTHER PEOPLE DO NOT HAVE ACCESS TO THE AREA, ARE NOT IN THE AREA, CANNOT HEAR WHAT IS BEING SAID, AND TO PROVIDE FOR THAT.

NOW, IT IS POSSIBLE, I SUPPOSE, TO PROVIDE THAT – THAT AREAS WILL BE PROVIDED FOR CONFESSION AND PRIVACY WILL BE ASSURED, YOU KNOW, IF REQUESTED OR SOMETHING, SO – MAYBE

SOME PEOPLE DON'T CARE, IT'S NOT THAT IMPORTANT TO THEM OR TO THE PRIEST.

BUT I THINK CLEARLY FOR THOSE WHO DO REQUEST THAT PRIVACY, IF IT'S NOT GOING TO BE PROVIDED ACROSS THE BOARD, AT LEAST FOR THOSE WHO REQUEST IT, IT HAS TO BE MADE AVAILABLE. AND YOU CAN SORT OF PLAY AROUND WITH THAT AND SEE WHETHER YOU WANT TO DO IT BASED ON REQUEST SO THAT IT DOES LEAVE YOU A LITTLE MORE FLEXIBILITY, BUT AT LEAST IT HAS TO BE AVAILABLE FOR THOSE WHO – WHO REQUEST IT. AND BY "PRIVACY," I MEAN COMPLETE PRIVACY IN THAT IT CANNOT BE HEARD BY OTHERS THAN THE PENITENT AND THE PRIEST.

WITH RESPECT TO THE RIGHT TO HAVE ROSARIES AND SCAPULARS. I WANT REDUCED TO WRITING A POLICY THAT WILL ALLOW FOR THAT. I MEAN, I CAN CERTAINLY SEE APPROPRIATE LIMITATIONS. NO MORE THAN ONE SET PER – YOU KNOW. A ROSARY AND A SCAPULAR FOR – PER PRISONER. I CAN SEE APPROPRIATE PARAMETERS TO THAT.

FOR EXAMPLE, IF IT IS FOUND THAT A PRISONER ABUSES THOSE POSSESSIONS IN SOME WAY THAT VIOLATES PRISON POLICY, THAT THEY CAN BE REMOVED, AND THAT OBVIOUSLY THEY'RE ONLY GIVEN UPON REQUEST.

IF YOU PLACE LIMITATIONS ON THEM. I'LL TAKE A LOOK TO SEE HOW REASONABLE THOSE LIMITATIONS ARE.

I'D ASK FOR THAT POLICY TO BE REDUCED TO WRITING AND SUBMITTED TO THE COURT AND TO OPPOSING COUNSEL WITHIN 60 DAYS, AND WE'LL SET A DATE FOR THAT.

IF THAT IS FORTHCOMING, THEN – AND I'M SATISFIED WITH THAT, THEM, YOU KNOW, I WON'T HAVE TO TAKE ANY SPECIFIC ACTION MYSELF.

AND I WOULD FIND THAT FAR PREFERABLE –

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE
MARILYN HALL PATEL, JUDGE

JACK WAYNE FRIEND, et al, NO. C-87-0161 MHP

Plaintiffs, SAN FRANCISCO, CA

-vs.- MARCH 13, 1989

RONALD KOLODZIECZAK, et al.,

Defendants.

REPORTERS' TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:
LAW OFFICES OF AMITAI SCHWARTZ
155 MONTGOMERY STREET
SUITE 800
SAN FRANCISCO, CALIFORNIA 94104

BY: AMITAI SCHWARTZ, ESQ.
SUE OCHS

FOR DEFENDANTS:
BENNETT, SAMUELSEN,
REYNOLDS & ALLARD
1951 WEBSTER STREET, SUITE 200
OAKLAND, CALIFORNIA 94612-200

BY: RICHARD REYNOLDS

REPORTED BY:
ROBIN JORSTAD
OFFICIAL REPORTER
UNITED STATES DISTRICT COURT

MONDAY, MARCH 13, 1989

PROCEEDINGS

THE CLERK: CIVIL ACTION 87-161, FRIEND VERSUS KOLOGZIECZAK FOR FURTHER STATUS. COUNSEL, YOUR APPEARANCES, PLEASE.

MR. REYNOLDS: GOOD MORNING, YOUR HONOR, RICHARD REYNOLDS REPRESENTING DEFENDANTS.

MR. SCHWARTZ: GOOD MORNING, YOUR HONOR, AMITAI SCHWARTZ AND SUE OCHS REPRESENTING THE PLAINTIFFS.

THE COURT: GOOD MORNING. IN TERMS OF THE EQUITABLE RELIEF OR INJUNCTIVE RELIEF, IT LOOKS LIKE MOST THINGS ARE WORKED OUT EXCEPT FOR THE POSSESSION OF CERTAIN RELIGIOUS ITEMS –

MR. SCHWARTZ: THAT'S CORRECT, YOUR HONOR.

THE COURT: – BY THE INMATES THEMSELVES. YOU ARE NOT ASKING TO HAVE THE INMATES HAVE THEM AT ALL TIMES, AS LONG AS THERE'S SOME REASONABLE AVAILABILITY.

IT THAT CORRECT.

MR. SCHWARTZ: WELL, NO, WE ARE ASKING THAT THEY HAVE THEM AT ALL TIMES. TO THE EXTENT THAT THE POSSESSION OF ANY PARTICULAR ITEM OR THE POSSESSION OF AN ITEM AT A PARTICULAR TIME WOULD CAUSE SOME SECURITY

PROBLEM. THE LAWSUIT AROSE BECAUSE MR. FRIEND, THE FIRST NAMED PLAINTIFF, WASN'T ABLE TO POSSESS HIS ROSARY AND SCAPULAR AFTER A PARTICULAR TIME AT THE JAIL.

THEN THERE WAS ALSO AN ISSUE RAISED AS TO THE PROVISION OF THE RELIGIOUS WORSHIP SERVICES AND THE SACRAMENTS.

THE CORE ISSUE THAT THIS STARTED OVER IS THE POSSESSION OF THESE ROSARIES AS PERSONAL ITEMS.

THE COURT: WHAT DO YOU DO IF SOMEONE WANTS A COPY OF THE BIBLE IN A PARTICULAR VERSION THAT IS ACCEPTABLE TO THEIR RELIGIOUS RELIEF OR ANY OTHER SCRIPTURES FROM ANY OTHER RELIGION?

MR. REYNOLDS: THE SCRIPTURES ARE AVAILABLE THROUGH THE CHAPLAIN, AND HE ALSO MAKES RELIGIOUS VISITS TO ALL THE INMATES, NOT JUST HIS CHOSEN FAITH, THE CHAPLAIN IS SORT OF A COORDINATOR OF ALL THE RELIGIOUS SERVICES.

ALSO, THE INMATE IS FREE TO ORDER THAT DIRECTLY FROM THE PUBLISHER AS LONG AS IT ARRIVES IN SEALED BOXES FROM THE PUBLISHER, PLUS THE PRACTITIONERS ARE ALLOWED TO BRING LITERATURE AND DISTRIBUTE THAT TO THE INMATES.

I THINK WE HAVE A RECORD THAT HAS OCCURRED AND DOES OCCUR IN THE JAIL.

THE COURT: TO FIND A WAY OF HAVING THE COURT ISSUE IT BECAUSE I THOUGHT IT WOULD BE BETTER IF YOU COULD WORK IT SO YOU CAN SEE WHERE THIS IS GOING.

IF THE COURT HAS TO DO IT, I WILL DO IT, BUT I THINK YOU OUGHT TO WORK OUT SOMETHING.

THE COURT: LET'S DO THIS SINCE CLEARLY IT HASN'T WORKED TO LEAVE IT TO YOUR OWN HE DEVICES TO RESOLVE IT.

ASSUME NOW, AND THIS IS NOT ARGUENDO, BECAUSE THE ORDER WILL ISSUE THAT THE COUNTY IS GOING TO HAVE TO COME UP WITH RULES, OR THE COURT WILL, THAT IT PROVIDES FOR THE SECURITY AND SAFETY OF THE INMATE AND OTHER INMATES AND OTHER PERSONS IN THE FACILITY, BUT THAT YOU THESE ITEMS WILL BE MAINTAINED OR POSSESSED BY THE INMATES AS RELIGIOUS ARTICLES, PERSONAL RELIGIOUS ARTICLES AT ALL TIMES.

THE ONLY QUESTION WILL THEN E DO THE PARTICULAR ITEMS PASS MUSTER AS FAR AS SECURITY IS CONCERNED, WHAT THEY ARE MADE OF, COMPOSITION.

LET'S FACE IT, WE ALL KNOW THAT A LOT OF THE DEVICES THAT ARE MAINTAINED FOR HYGIENIC PURPOSES OR WHATEVER IN THE JAIL CAN, FOR INMATES WITH EXTRAORDINARY SKILL OR TOO MUCH TIME ON THEIR HANDS, BE TURNED INTO DEVICES THAT WILL BECOME WEAPONS.

THERE'S NO ABSOLUTE WAY OF PROTECTING AGAINST THAT, BUT CERTAINLY THE JAIL HAS THE RIGHT TO IMPLEMENT SOME REASONABLE SECURITY REGULATIONS AS TO WHAT THESE THINGS MAY BE MADE OF OBVIOUSLY, THE PERSON MAY POSSESS ONLY ONE OF EACH OF ANY PARTICULAR TYPE OF RELIGIOUS ARTICLE.

I WILL GIVE THE COUNTY TWO WEEKS TO COME BACK – I WILL GIVE YOU THIRTY DAYS TO COME BACK WITH A DRAFTED REGULATION THAT IMPLEMENTS THAT.

IF YOU DON'T I WILL HAVE TO. OTHER THAN ORDERING THAT, YOU COME UP WITH A REGULATION BECAUSE I DON'T FEEL I AM THE PERSON TO DO THAT.

SO YOU TAKE THAT BACK AND TELL THEM TO GET ON TOP OF IT, AND COME BACK WITH THE PROPOSAL IN THE NEXT THIRTY DAYS, AND IT WILL BE INCORPORATED IN THE ORDER.

WITH THAT DONE, CAN YOU WORK OUT SOMETHING WITH RESPECT TO THE REMAINING ISSUES? I GUESS THE REMAINING ISSUE IS DAMAGES. DO YOU THINK YOU CAN WORK THAT OUT?

THE COURT: IF WE DON'T GET SOMETHING IN WRITING IN THIRTY DAYS THAT REPRESENTS A REASONABLE RESTRICTION ON THE PERSONAL POSSESSION OF THESE ITEMS, REASONABLE FOR SECURITY PURPOSES, THEN THE COURT WILL ISSUE AN ORDER.

I WILL ISSUE AN ORDER IN ANY EVENT TO TAKE CARE OF THE PROBLEM, BUT I WILL DO THAT AFTERWARD. I JUST WANT YOU TO KNOW THAT'S FORTHCOMING.

I PREFER NOT TO PUT IN MY ORDER THE SPECIFICS BUT LEAVE THAT TO THE COUNTY, BUT IF YOU DON'T COME UP WITH IT, I GUESS I WILL HAVE TO.

MR. REYNOLDS: WILL THERE BE AN ORDER ISSUED TODAY?

THE COURT: NO, I AM NOT GOING TO ISSUE A WRITTEN ORDER, THE ORDER OF THE COURT IS VERBAL, AND IT WILL BE REDUCED TO WRITING IN A MORE GENERALIZED FORM THAT THEY ARE ENTITLED TO POSSESS ONE OF EACH OF THESE RELIGIOUS ITEMS THAT MEETS THE SECURITY AND OTHER REQUIREMENTS OF THE INSTITUTION AS PROVIDED FOR BY THE INSTITUTION.

IF THE INSTITUTION DOES NOT COME UP WITH SUCH A PROVISION, THEN I WILL HAVE TO BE A LITTLE MORE SPECIFIC MYSELF.

WE WILL CHECK WITH BOTH OF YOU AND SEE WHERE YOU STAND AS FAR AS THE REMAINING ISSUES, AND WHETHER OR NOT IT SHOULD BE REFERRED OUT TO A MAGISTRATE AN ATTEMPT TO SETTING OR HAVING ANY FURTHER MOTIONS ON THE ATTORNEYS' FEES ISSUE (PROCEEDINGS ADJOURNED.)

APPENDIX S

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK WAYNE FRIEND, et al., Plaintiffs and Appellees, vs. RONALD KOLODZIECZAK, et al., Defendants and Appellants.	NO. 93-16918 DC # C 87-0161 MHP SUGGESTION FOR REHEARING IN BANC [FRAP 35(a), (b)]

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Petitioners RONALD KOLODZIECZAK, the COUNTY OF ALAMEDA, CHARLES PLUMMER, SHERIFF OF ALAMEDA COUNTY, MORRIS HICKERSON, CAPTAIN OF ALAMEDA NORTH COUNTY JAIL, DEAN COMPTON, HAROLD ESTES, R. A. FRIST, CHUCK GREEN, and A. THEOBALD, the appellants above named, respectfully suggest that the above-entitled proceeding is appropriate for consideration by all the judges of this Court convened in banc. In support of this suggestion, petitioner hereby submits the following points and authorities.

I.

INTRODUCTION AND STATEMENT OF FACTS.

As a result of this Court's affirmance of the Northern District's award of attorneys' fees, plaintiffs' counsel is

now entitled to over $150,000.00 in attorneys' fees for an action which failed to net the North County Jail's Catholic inmates anything more than the pre-litigation status quo.[1]

In this case, county jail inmates claimed a constitutional right to possess rosaries in their jail cells. Defendants argued there was no such absolute right, and existing jail regulations reasonably accommodated any use of religious items at religious services. The District Court indicated summary judgment would be granted *in defendants' favor* if the existing general written regulations regarding supervised use of items at religious services were amended to specify rosaries and scapulars. To conclude the litigation promptly and inexpensively, defendants readily agreed to make explicit what was implicit in existing jail regulations.

No evidence exists nor was the contention ever made, of any restriction of any sort, ever, on religious items *at religious services*. The only restriction was possession of items *in the cell*, and this restriction was upheld by the District Court and the Ninth Circuit as well. Meanwhile, defendants' hope of expeditiously and economically concluding these fundamentally unmeritorious claims has resulted in years of continuing litigation and ever-escalating fee awards to the attorney appointed by the District Court to represent the inmates.

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[1] Attached hereto as Appendix A served and filed herewith is a copy of the Ninth Circuit Court of Appeals' September 19, 1995 Order and Dissenting Opinion of Warren J. Ferguson, Circuit

The other claim by the inmates was a failure to provide separate Catholic religious services, denying them their right to practice their religion. The undisputed facts were that the Catholic jail minister became involved in a dispute with the Protestant ministers over his disagreement with a jail religious program his own Bishop had approved; he then quit. Defendants argued it was absurd for them to be accused of violating anyone's religious rights under these facts. However, once a new chaplain was appointed, the jail readily agreed to a schedule the "Catholics" found acceptable.

Despite these circumstances, the Northern District has held (and the Ninth Circuit Court of Appeals affirmed) that the plaintiffs were "prevailing parties" for purposes of a Section 1988 fee award because the Order Granting summary Judgment was conditioned upon the jail providing written clarification of its long established penological policies. With its "Pyrrhic victory," plaintiff were able to secure an award of attorneys' fees based upon an 85% lodestar ratio.

Following a defense petition for certiorari to the United States Supreme Court, the fee award was *summarily vacated* and the case was remanded to the Ninth Circuit, then to the Northern District Court for re-examination of the reasonableness of the attorneys' fees award in light of the Supreme Court decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992). Ignoring the implied mandate and concern of the Supreme Court of the United States and giving only fleeting attention to the decision in *Farrar*, the Northern District *reaffirmed its original order* and awarded *yet additional fees and costs with interest*. Despite contrary precedent of the Supreme Court and even the Ninth

Circuit, the Ninth Circuit Court of Appeals (before Harry Pregerson, Warren J. Ferguson, dissenting opinion, and Diarmuid F. O'Scannlain, Circuit Judges), upheld the latest District Court award.

In order to maintain uniformity of decisions on an issue of exceptional importance, cure gross injustice, and resolve a patently irreconcilable conflict within this circuit, it is respectfully requested that this court rehear this matter in banc.

II.

REHEARING IN BANC IS CALLED FOR BECAUSE THIS COURT'S AWARD OF ATTORNEYS' FEES FOR PLAINTIFFS' PYRRHIC VICTORY IS A GROSS INJUSTICE WHICH DECISION IS CONTRARY TO OTHER NINTH CIRCUIT HOLDINGS AND PRINCIPLES ESTABLISHED BY THE UNITED STATES SUPREME COURT.

Any party may suggest the appropriateness of a hearing or rehearing in banc where 1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or 2) when the proceeding involves a question of exceptional importance. FRAP §35(a),(b). Furthermore, and more importantly, Ninth Circuit law holds that an irreconcilable conflict between two different panel decisions *must be resolved by the court in banc. United States v. Hardesty* (1992, CA9 Or.) 977 F.2d 1347, Cert. den. (US) 113 S.Ct. 1429. Finally, a decision of manifestly gross injustice will serve as a basis for rehearing in banc. *U.S. v. Lynch* (1982) 690 F.2d 213.

III.

SECTION 1988 ATTORNEYS' FEES ARE MATTERS OF EXCEPTIONAL IMPORTANCE. PRIOR HOLDINGS OF THIS CIRCUIT ARE INCONSISTENT WITH *FRIEND* NECESSITATING IN BANC REVIEW.

In *Texas State Teachers Association v. Garland Independent School District*, 109 S.Ct. 1486 (1989), the United States Supreme Court granted certiorari specifically "because of the *conflicting views* in the Court of Appeals, and because of the *importance of the definition of the term 'prevailing party'* to the application of [42 U.S.C.] §1988. . . . "

Garland involved an appeal from the Fifth Circuit Court of Appeal's determination that teachers were *not* prevailing parties for purposes of awarding §1988 attorneys' fees after applying a more restrictive "central issue" test. Like *Garland*, this matter involves the very same question of such exceptional importance: Who is the "prevailing party?" Also, whereas *Garland* involved the *lack of uniformity* amongst Fifth District Courts of Appeal in applying one of two "prevailing party" tests, this case simply involves lack of uniformity in applying the standard set forth under *Farrar v. Hobby, supra*, and *Sablan v. Dep't. of Fin. of Com. of N. Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988).

Previously, the Ninth Circuit has held that prison officials are not required to provide full religious Pentecostal services (including speaking in tongues and laying hands on one another) to inmates. *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995). In upholding Judge Marilyn Hall Patel's summary judgment *in favor of defendants*, the Ninth

Circuit Court of Appeal held there was no substantial burden on Bryant's religious rights and therefore no violation of the Religious Freedom Restoration Act. (42 U.S.C. §§ 2000 bb.) Similarly, in an opinion authored by Circuit Judge Diarmuid F. O'Scannlain, this court held that an Orthodox Jewish prisoner incarcerated at the Ely State Prison was not entitled to the spiritual counselor of his choice nor was the prison under any obligation to provide single-fabric clothing since such preferential treatment could cause conflicts amongst the inmates. *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993).

Here, the record establishes that the North County inmates had interdenominational services and that the jail authorities had already taken steps to secure Catholic services even though there was no obligation to do so. Despite these circumstances, and despite plaintiffs' failure to establish their prevailing party status under either *Farrar* or *Sablan*, plaintiffs were nevertheless awarded full attorneys' fees.

Under *Farrar v. Hobby*, 113 S.Ct. 566 (1992), the United States Supreme Court held a fee award should be based upon the amount of success achieved by the plaintiffs, not to provide windfalls to attorneys. *Id.* at Page 575. A "judicial pronouncement that the defendant has violated the constitution, unaccompanied by an enforceable judgment on the merits, does not render plaintiff a prevailing party." *Id.* at Page 573. Additionally, the Ninth Circuit has applied a 2-prong test which asks 1) whether the lawsuit resulted in the relief obtained and 2) whether there is a legal basis for plaintiffs' claim. *Sablan, supra*, at 856 F.2d at Page 1325. Under neither of these standards can plaintiffs be deemed a prevailing party.

Here the only "success" achieved by plaintiffs was to have the North County Jail "clarify" its existing policies on religious services and the possession of certain articles. There has been no judicial pronouncement that defendants violated the constitution or any enforceable judgment on the merits or even its own regulations.

Plaintiffs sought to secure possession of rosaries and scapulars in their jail cells, as well as segregated Catholic services. The right to possess scapulars and rosaries was denied on summary judgment; even before the lawsuit was filed, jail authorities had cooperated fully in the provision of Catholic services. Even had the jail officials never undertaken to provide Catholic services, the issue would be moot as there is no legal basis for plaintiffs' claim. As stated in *Ward*, "[t]he prison . . . in no way restricts Ward's ability to contact a Rabbi on his own to come to the prison, nor does it forbid Rabbis from coming to the prison. *Ward, supra*, at Page 880. Likewise, there is no evidence to suggest the Catholic inmates were prevented from contacting a Catholic Priest or Priests prevented from coming to the jail facility. Along these lines, the United States Supreme Court in *Garland* provides a similar example whereby plaintiffs will *not be* deemed prevailing parties for purposes of attorneys' fees award under §1988:

> For example, in the context of this litigation, the District Court found that the requirement that non-school hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. [Citation omitted.] The District Court characterized this issue as 'of minor significance' and noted that there was 'no evidence that the plaintiffs were

> ever refused permission to use school premises during non-school hours.' [Citation omitted.] If this had been petitioner's only success in the litigation, *we think it is clear that this alone would not have rendered them 'prevailing parties' within the meaning of §1988.* Where the plaintiff's success on a legal claim can be characterized as purely technical or de minimus, a district court would be justified in concluding that the 'generous formulation' we adopt today has been satisfied. (Emphasis added.) *Garland, supra,* at Pages 1493-1494.

Like the example in *Garland,* there is no evidence that plaintiffs were ever refused permission to initiate and conduct Catholic services. Their only "success" in this litigation was clarifying heretofore established jail policies in order to end the litigation. Under the circumstances, plaintiffs cannot be deemed prevailing parties by any stretch of the imagination.

Given this circuit's holdings in *Bryant, Ward* and *Sablan,* as well the Supreme Court holdings in *Garland* and *Farrar,* the award of attorneys' fees in this matter is clearly anomalous; it is demonstrative of the lack of uniformity of decisions within the Ninth Circuit. Just as the United States Supreme Court recognized the need to resolve conflicting views amongst the Fifth Circuit in *Garland,* so should this Court grant in banc review to resolve conflicts within its own circuit, especially on a question that the Supreme Court has declared of such exceptional importance.

IV.

IN BANC REHEARING IS NECESSARY TO CURE THE GROSS INJUSTICE THAT WOULD RESULT SHOULD PLAINTIFFS RECOVER OVER $150,000.00 FOR SUCH A PYRRHIC VICTORY.

In determining §1988 fee awards, "[T]he most critical factor is the *degree of success* obtained. *Garland, supra* at Page 492 (citing *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983)). In *Farrar v. Hobby,* Justice O'Connor stated in her concurring opinion,

> [W]here the net result achieved is so far from the position originally propounded . . . it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of fee claimants (citations omitted). *Farrar, supra,* at Page 578.

Here, no rights of the prisoners have been vindicated as they are neither entitled to segregated services nor to possession of contraband rosaries and scapulars. When summary judgment in favor of defendants was affirmed by this very Court [*Friend v. Kolodzieczak, 923 F.2d 126, 128 (9th Cir. 1991)*], one would be hard-pressed to imagine "victorious" Roman Catholic inmates celebrating their newly-edited jailhouse guidelines. Plaintiffs' victory is more than a stretch of the imagination, it is a $150,000.00 pipe dream for which defendants are now obligated to pay. When the smoke has cleared, the net result of this Court's finding is a $150,000.00 windfall to an attorney appointed by the District Court to advocate an unmeritorious claim. Such was not the intent of §1988. *Riverside v. Rivera,* 477 U.S. 561, 580 (1986).

V.

REHEARING IN BANC IS APPROPRIATE SINCE THIS COURT'S HOLDING IN *SABLAN*, *BRYANT*, AND *WARD* CREATE AN IRRECONCILABLE CONFLICT WITH THE AWARD OF ATTORNEYS' FEES HEREIN.

In his strongly worded dissenting opinion, Circuit Judge Warren Ferguson denounced the majority's holding as it "has created an unexplained conflict with our case of *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995), by explicitly granting rights to Roman Catholics which are denied to other religious denominations." *Friend v. Kolodzieczak*, 95 C.D.O.S. 7360, 7362 (Ferguson, dissenting opinion). Not only is this Court holding at odds with *Bryant*, but is also irreconcilable with this Court's holding in *Ward, supra.* Both cases stand for the proposition that inmates are not entitled to preferential religious services or implements, which was precisely what plaintiffs' complaint sought. In the end, the inmates received no better than the status quo: interdenominational services and supervised use of rosaries and scapulars. As the *Garland* and *Hensley* cases make clear, the plaintiff must prevail by obtaining a benefit they *sought in bringing the lawsuit*. Once again, it bears repeating that it would be an incredible stretch of the imagination to conclude that a re-written policy was a "benefit" the inmates sought to achieve.

Since the lawsuit failed to net the inmates any additional rights, nor did their claim have any legal basis under the holdings of *Bryant* and *Ward*, this Court's holding is made further irreconcilable with this circuit's 2-prong prevailing party test under *Sablan, supra.* Such an

anomalous result cannot be resolved without in banc review.

CONCLUSION

42 U.S.C. §1988 was never intended to reward attorneys for baseless claims or hollow victories. Left unresolved, the precedential significance of such a patently erroneous ruling is both staggering and frightening. For example, an attorney can now potentially sue a jail facility for §1983 relief alleging inadequate medical care, then claim victory after doing no more than obtaining copies of the medical school diplomas of the prison physicians. Or, an attorney could bring a lawsuit alleging malnutrition, then claim victory when all he obtains are copies of the prison's food service recipes. Finally, an attorney could file a lawsuit alleging overcrowded prison conditions, then claim victory when he receives a roster of inmates.

In short, rehearing in banc is mandated because prevailing party attorneys' fees are an issue of great importance which principles have not been consistently applied within the Ninth Circuit or, in this case, by Northern District Judges. Furthermore, to expect the Alameda County taxpayers to pay $150,000.00 for providing the North County Jail's inmates with a rewritten penological policy is grossly unjust and absurd.

Under the foregoing circumstances, appellants have demonstrated an irreconcilable conflict within the Ninth Circuit which mandates an in banc rehearing. *U.S. v. Hardesty* (1992, CA9 Or.) 977 F.2d 1347, Cert. den. 113 S.Ct. 1429.

WHEREFORE, it is respectfully requested that this Court order rehearing of the above-entitled matter in banc.

DATED: October 2, 1995

Respectfully submitted,

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